

7-29-2016

# Washington Federal v. Hulsey Clerk's Record v. 6 Dckt. 43936

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Washington Federal v. Hulsey Clerk's Record v. 6 Dckt. 43936" (2016). *Idaho Supreme Court Records & Briefs, All*. 6351.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6351](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6351)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

Vol. 6 of 8

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

WASHINGTON FEDERAL **LAW CLERK**

**COPY**

Plaintiff, \_\_\_\_\_ and

Volume 6

Appellant,  
vs. \_\_\_\_\_

MICHAEL R HULSEY, ET AL,

\_\_\_\_\_  
Defendant, \_\_\_\_\_ and

\_\_\_\_\_  
Respondents.

Appealed from the District Court of the First  
Judicial District for the State of Idaho, in and

for Shoshone County County

Hon. Benjamin Simpson District Judge

Terry Copple

\_\_\_\_\_  
Attorney for Appellant

John Magnuson

**SEE AUGMENTATION RECORD**

Attorney for Respondent

Filed this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

By \_\_\_\_\_

**FILED - COPY**

Clerk

**JUL 29 2016**

Deputy

Supreme Court \_\_\_\_\_ Court of Appeals  
Entered in the \_\_\_\_\_

CAXTON PRINTERS, CALDWELL, IDAHO

**73936**

**TABLE OF CONTENTS FOR VOLUME 6**

DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015.....	1337
DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 17, 2015 .....	1342
DEFENDANT'S HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015.....	1355
COURT MINUTES RE: 9-22-2015 COURT TRIAL .....	1360
POST-TRIAL BRIEFING ORDER, FILED SEPTEMBER 25, 2015 .....	1369
WASHINGTON FEDERAL'S POST-TRIAL BRIEF, FILED OCTOBER 7, 2015.....	1372
POST-TRIAL OPENING BRIEF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED OCTOBER 7, 2015 .....	1400
DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 20, 2015 .....	1452
WASHINGTON FEDERAL'S RESPONSE TO DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 21, 2015 .....	1456
PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 21, 2015.....	1459
DEFENDANT'S OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 23, 2015 .....	1461
MEMORANDUM DECISION, FILED NOVEMBER 13, 2015 .....	1464
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED DECEMBER 23, 2015 .....	1479
MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1482
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1486

FINAL JUDGMENT, FILED DECEMBER 23, 2015 .....	1508
MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510A
MEMORANDUM OF COSTS AND ATTORNEY FEES ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510
AFFIDAVIT OF JOHN MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES MEMORANDUM OF COSTS AND ATTORNEY FEES AND MOTION FOR AWARD OF ATTORNEY FEES, FILED DECEMBER 31, 2015 .....	1518
DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1533
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES), FILED JANUARY 8, 2016.....	1535
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1537A
MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016.....	1537B
DECLARATION OF JOHN MAGNUSON IN SUPPORT OF MOTION TO STRIKE, FILED JANUARY 8, 2016.....	1538
NOTICE OF HEARING, FILED JANUARY 8, 2016.....	1541
WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016.....	1542
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016.....	1545



WASHINGTON FEDERAL’S MOTION FOR REFERRAL TO THE  
HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....1584

AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF WASHINGTON  
FEDERAL’S MOTION FOR REFERRAL TO THE HONORABLE  
FRED GIBLER, FILED JANUARY 11, 2016.....1587

**SUPREME COURT NO. 43936     DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD FOR VOLUME 6**

AFFIDAVIT OF JOHN MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES MEMORANDUM OF COSTS AND ATTORNEY FEES AND MOTION FOR AWARD OF ATTORNEY FEES, FILED DECEMBER 31, 2015 .....	1518
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016 .....	1545
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1486
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....	1587
COURT MINUTES RE: 9-22-2015 COURT TRIAL .....	1360
DECLARATION OF JOHN MAGNUSON IN SUPPORT OF MOTION TO STRIKE, FILED JANUARY 8, 2016 .....	1538
DEFENDANT'S HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1355
DEFENDANT'S OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 23, 2015 .....	1461
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1337
DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 17, 2015 .....	1342
DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 20, 2015 .....	1452
DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1533

FINAL JUDGMENT, FILED DECEMBER 23, 2015 .....	1508
MEMORANDUM DECISION, FILED NOVEMBER 13, 2015 .....	1464
MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016.....	1537B
MEMORANDUM OF COSTS AND ATTORNEY FEES ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510
MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1482
MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510A
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES), FILED JANUARY 8, 2016.....	1535
NOTICE OF HEARING, FILED JANUARY 8, 2016.....	1541
PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 21, 2015.....	1459
POST-TRIAL BRIEFING ORDER, FILED SEPTEMBER 25, 2015 .....	1369
POST-TRIAL OPENING BRIEF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED OCTOBER 7, 2015 .....	1400
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED DECEMBER 23, 2015 .....	1479
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1537A
WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....	1584
WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016.....	1542

WASHINGTON FEDERAL’S POST-TRIAL BRIEF,  
FILED OCTOBER 7, 2015.....1372

WASHINGTON FEDERAL’S RESPONSE TO DEFENDANTS MOTION TO  
STRIKE, FILED OCTOBER 21, 2015 .....1456

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS..... PAGE NO.**

**VOLUME 1**

CLERK'S RECORD ON APPEAL .....	A1
TABLE OF CONTENTS .....	B1
INDEX OF RECORD .....	C1
REGISTER OF ACTIONS.....	1
VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014.....	15
MOTION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014 .....	47
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014 .....	49
ACCEPTANCE OF SERVICE BY ATTORNEY, FILED FEBRUARY 19, 2014 .....	51
NOTICE OF APPEARANCE, FILED FEBRUARY 19, 2014 .....	53
SUPPLEMENTAL AFFIDAVIT OF ROY CUZNER IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER, FILED FEBRUARY 25, 2014 .....	55
AMENDED VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED FEBRUARY 25, 2014.....	83
ACCEPTANCE OF SERVICE BY ATTORNEY, FILED FEBRUARY 26, 2014 .....	145
AFFIDAVIT OF JIM KOON RE: MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014.....	147
LIS PENDENS, FILED MARCH 10, 2014 .....	155

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS ..... PAGE NO.**

AFFIDAVIT REGARDING LITIGATION GUARANTEE, FILED MARCH 10, 2014 .....	158
MEMORANDUM OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES IN RESPONSE TO PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014 .....	213
OBJECTION OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES TO PLAINTIFF'S SUBMISSIONS, FILED MARCH 10, 2014 .....	220
AFFIDAVIT OF JOHN F MAGNUSON, FILED MARCH 10, 2014 .....	222
AFFIDAVIT OF JIM KOON RE: MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014.....	225
STIPULATION, FILED MARCH 13, 2014 .....	234

**VOLUME 2**

COURT MINUTES RE: 3-17-2014 MOTION FOR APPOINTMENT OF RECEIVER.....	258
ORDER REGARDING APPOINTMENT OF RECEIVER AND PROPERTY MANAGER, FILED MARCH 17, 2014.....	259
ORDER APPOINTING RECEIVER, FILED MARCH 17, 2014 .....	282
AFFIDAVIT OF SERVICE, FILED MARCH 21, 2014 .....	301
NOTICE OF APPEARANCE, FILED MARCH 21, 2014 .....	302
NOTICE OF APPEARANCE, FILED APRIL 2, 2014 .....	305
ERRATA TO NOTICE OF APPEARANCE, FILED APRIL 3, 2014.....	308
ORDER ALLOWING PLAINTIFF TO FILE ITS SECOND AMENDED COMPLAINT, FILED APRIL 10, 2014.....	311



**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS .....</b>	<b>PAGE NO.</b>
SECOND AMENDED VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED APRIL 14, 2014 .....	316
STIPULATION FOR ENTRY OF PROTECTIVE ORDER, FILED APRIL 17, 2014 .....	382
ACKNOWLEDGE OF SERVICE BY ATTORNEY, FILED APRIL 24, 2014 .....	392
PROTECTIVE ORDER, FILED APRIL 30, 2014 .....	394
REQUEST FOR TRIAL SETTING, FILED MAY 5, 2014 .....	400
NOTICE OF APPEARANCE ON BEHALF OF MORNING STAR LODGE OWNERS ASSOCIATION, FILED MAY 7, 2014 .....	404
RESPONSE TO REQUEST FOR TRIAL SETTING, FILED MAY 13, 2014 .....	407
ANSWER OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES TO SECOND AMENDED COMPLAINT, FILED MAY 23, 2014 .....	411
RECEIVER'S MONTHLY REPORT FOR MAY 2014, FILED JUNE 11, 2014 .....	419
MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	430
WASHINGTON FEDERAL'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	433
NOTICE OF PLEADINGS IN COURT RECORD IN SUPPORT OF WASHINGTON FEDERAL'S MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	441
AFFIDAVIT OR ROY CUZNER WITH REGARD TO MERGER OF WASHINGTON FEDERAL WITH SOUTH VALLEY BANK AND TRUST, FILED JULY 3, 2014 .....	445
AFFIDAVIT OF VICKI MUNDLIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	453

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS ..... PAGE NO.**

**VOLUME 3**

STIPULATION TO DISMISS SILVER MOUNTAIN CORPORATION AND MORNING STAR LODGE OWNERS ASSOCIATION, FILED JULY 17, 2014 .....	573
COURT MINUTES RE: 7-21-2014 SCHEDULING CONFERENCE .....	575A
STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED JULY 23, 2014 .....	576
ORDER TO PERMIT RECEIVER TO EXTEND LEASES, FILED JULY 25, 2014 .....	583
NOTICE OF TRIAL, FILED JULY 25, 2014 .....	586
RECEIVER'S MONTHLY REPORT FOR JUNE 2014, FILED JULY 29, 2014 .....	593
SECOND AFFIDAVIT OF JOHN MAGNUSON RE: OBJECTION TO STIPULATION TO PERMIT RECIEVER TO EXTEND LEASES, FILED JULY 29, 2014 .....	604
MOTION IN AID OF OBJECTION TO STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED JULY 30, 2014 .....	613
AFFIDAVIT OF JOHN F MAGNUSON, FILED JULY 30, 2014 .....	619
DECLARATION OF MICHAEL R HULSEY, FILED AUGUST 4, 2014 .....	629
DEFENDANTS' BRIEF IN OPPOSITION TO WASHINGTON FEDERAL'S MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 4, 2014.....	637
WASHINGTON FEDERAL'S RESPONSE TO MOTION IN AID OF OBJECTION TO STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED AUGUST 6, 2014.....	643
WASHINGTON FEDERAL'S REPLY BRIEF TO DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 6, 2014.....	649

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS .....</b>	<b>PAGE NO.</b>
DECLARATION OF DAVID RINNING IN SUPPORT OF STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED AUGUST 8, 2014.....	654
ORDER DISMISSING SILVER MOUNTAIN CORPORATION AND MORNING STAR LODGE OWNERS ASSOCIATION, FILED AUGUST 11, 2014.....	717
DISCLOSURE OF EXPERT WITNESSES, FILED AUGUST 12, 2014.....	719
NOTICE OF COMPLIANCE WITH EXPERT WITNESS DISCLOSURES, FILED AUGUST 12, 2014.....	727
COURT MINUTES RE: 8-18-2014 MOTION FOR SUMMARY JUDGMENT.....	730
STIPULATION FOR ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, FILED AUGUST 18, 2014 .....	732
JUDGMENT AND DECREE OF FORECLOSURE, FILED AUGUST 18, 2014 .....	736
ORDER RE: EXTENSION OF LEASES, FILED AUGUST 21, 2014.....	743
RECEIVER'S MONTHLY REPORT FOR JULY 2014, FILED AUGUST 26, 2014.....	746
RECEIVER'S MONTHLY REPORT FOR AUGUST 2014, FILED SEPTEMBER 4, 2014.....	758
MOTION FOR RECONSIDERATION OF "ORDER RE: EXTENSION OF LEASES", FILED SEPTEMBER 4, 2014 .....	770
OBJECTION TO MOTION FOR RECONSIDERATION, FILED SEPTEMBER 8, 2014.....	773
AFFIDAVIT OF AMOUNT DUE, FILED SEPTEMBER 9, 2014.....	777
WRIT OF EXECUTION, ISSUED SEPTEMBER 9, 2014.....	780
NOTICE OF INTENT TO COMPENSATE, FILED SEPTEMBER 9, 2014 .....	783

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS ..... PAGE NO.**

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF "ORDER RE: EXTENSION OF  
LEASES", FILED SEPTEMBER 11, 2014 ..... 797

AFFIDAVIT OF JOHN MAGSNUSON IN SUPPORT OF MOTION FOR  
RECONSIDERATION, FILED SEPTEMBER 11, 2014 ..... 800

WASHINGTON FEDERAL'S RESPONSE TO HULSEY'S REPLY  
MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION, FILED SEPTEMBER 12, 2014 ..... 804

ORDER DENYING RECONSIDERATION, FILED SEPTEMBER 18, 2014 ..... 809

RECEIVER'S MONTHLY REPORT FOR SEPTEMBER 2014..... 811

**VOLUME 4**

NOTICE OF BANKRUPTCY CASE FILING (DEFENDANT SM  
COMMERCIAL PROPERTIES), FILED OCTOBER 30, 2014 ..... 824

COURT MINUTES RE: 11-3-2014 PRETRIAL CONFERENCE..... 827

WRIT OF EXECUTION AND NOTICE OF LEVY, RETURNED  
UNSATISFIED, FILED NOVEMBER 4, 2014..... 828

COURT MINUTES RE: 11-17-2014 STATUS HEARING..... 844

RECEIVER'S MONTHLY REPORT FOR OCTOBER AND NOVEMBER  
2014, FILED DECEMBER 30, 2014 ..... 845

NOTICE OF ENTRY OF BANKRUPTCY COURT ORDER AUTHORIZING  
FORECLOSURE, FILED JANUARY 2, 2015..... 869

MEMORANDUM IN SUPPORT OF DEFENDANT'S OBJECTION AND  
MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF ATTORNEY'S FEES AND COST,  
FILED JANUARY 5, 2015 ..... 874A

AFFIDAVIT OF AMOUNT DUE, FILED JANUARY 7, 2015 ..... 874

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS.....</b>	<b>PAGE NO.</b>
REQUEST FOR TRIAL SETTING FOR DETERMINATION OF DEFICIENCY LIABILITY, FILED JANUARY 7, 2015.....	877
RECEIVER'S MONTHLY REPORT FOR DECEMBER 2014.....	880
RESPONSE OF DEFENDANT'S HULSEY AND SM COMMERCIAL PROPERTIES TO PLAINTIFF'S REQUEST FOR TRIAL SETTING FOR DETERMINATION OF DEFICIENCY LIABILITY, FILED JANUARY 14, 2015 .....	894
NOTICE OF TRIAL, FILED JANUARY 23, 2015.....	897
RECEIVER'S MONTHLY REPORT FOR JANUARY 2015, FILED FEBRUARY 5, 2015 .....	904
EXPERT WITNESS DISCLOSURE BY DEFENDANT'S SM COMMERCIAL AND HULSEY, FILED FEBRUARY 11, 2015 .....	918
NOTICE OF INTENT TO COMPENSATE, FILED FEBRUARY 13, 2015 .....	925
NOTICE OF ENTRY OF ORDER OF DISMISSAL OF SM COMMERCIAL PROPERTIES, FILED FEBRUARY 17, 2015 .....	935
WRIT OF EXECUTION, RETURNED SATISFIED IN FAVOR OF PLAINTIFF, FILED MARCH 5, 2015 .....	940
NOTICE OF INTENT TO COMPENSATE, FILED MARCH 6, 2015.....	960
DISCLOSURE OF EXPERT WITNESS, FILED MARCH 10, 2015 .....	972
RECEIVER'S MONTHLY REPORT FOR FEBRUARY 2015.....	978
RECEIVER'S MONTHLY REPORT FOR MARCH 2015, FILED APRIL 3, 2015 .....	992
NOTICE OF INTENT TO COMPENSATE, FILED APRIL 6, 2015 .....	1007
RECEIVER'S FINAL REPORT AND ACCOUNTING, FILED APRIL 9, 2015 .....	1020

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS.....PAGE NO.**

DECLARATION OF DAVID RINNING IN SUPPORT OF MOTION FOR TERMINATION OF RECEIVERSHIP, FILED APRIL 9, 2015 .....	1030
COURT MINUTES RE: 4-13-2015 MOTION TO TERMINATE RECEIVERSHIP .....	1046
ORDER APPROVING RECEIVER'S FINAL REPORT AND DISCHARGING RECEIVER, FILED APRIL 23, 2015 .....	1047
STIPULATION TO ENTRY OF ORDER ON RECIEVER'S "NOTICE OF INTENT TO COMPENSATE", FILED MAY 1, 2015 .....	1062

**VOLUME 5**

FIRST SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESS, FILED MAY 6, 2015 .....	1068
FIRST SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESS, FILED MAY 11, 2015 .....	1158
COURT MINUTES RE: 8-17-2015 PRETRIAL CONFERENCE.....	1160
COURT MINUTES RE: 9-9-2015 STATUS HEARING.....	1161
DISCLOSURE OF TRIAL WITNESSES BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 10, 2015 .....	1162
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES EXHIBIT LIST, FILED SEPTEMBER 10, 2015 .....	1164
WASHINGTON FEDERAL'S TRIAL EXHIBIT LIST, FILED SEPTEMBER 11, 2015.....	1169
PLAINTIFF WASHINGTON FEDERAL'S DISCLOSURE OF TRIAL WITNESSES, FILED SEPTEMBER 11, 2015.....	1179
PLAINTIFF WASHINGTON FEDERAL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED SEPTEMBER 11, 2015.....	1182



**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS.....</b>	<b>PAGE NO.</b>
WASHINGTON FEDERAL'S TRIAL BRIEF, FILED SEPTEMBER 11, 2015.....	1191
SUPPLEMENTAL TRIAL WITNESS DISCLOSURE STATEMENT OF PLAINTIFF WASHINGTON FEDERAL, FILED SEPTEMBER 14, 2015.....	1203
PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 15, 2015 .....	1206
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 15, 2015 .....	1218
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 15, 2015 .....	1296
TRIAL BRIEF ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 15, 2015 .....	1304
AFFIDAVIT AUTHENTICATING BANKRUPTCY COURT HEARING TRANSCRIPT, FILED SEPTEMBER 17, 2015 .....	1312
 <b>VOLUME 6</b>	
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1337
DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 17, 2015.....	1342
DEFENDANT'S HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1355
COURT MINUTES RE: 9-22-2015 COURT TRIAL.....	1360
POST-TRIAL BRIEFING ORDER, FILED SEPTEMBER 25, 2015.....	1369

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS.....</b>	<b>PAGE NO.</b>
WASHINGTON FEDERAL'S POST-TRIAL BRIEF, FILED OCTOBER 7, 2015 .....	1372
POST-TRIAL OPENING BRIEF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED OCTOBER 7, 2015 .....	1400
DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 20, 2015.....	1452
WASHINGTON FEDERAL'S RESPONSE TO DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 21, 2015 .....	1456
PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 21, 2015 .....	1459
DEFENDANT'S OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 23, 2015 .....	1461
MEMORANDUM DECISION, FILED NOVEMBER 13, 2015 .....	1464
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED DECEMBER 23, 2015.....	1479
MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1482
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1486
FINAL JUDGMENT, FILED DECEMBER 23, 2015.....	1508
MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510A
MEMORANDUM OF COSTS AND ATTORNEY FEES ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>TABLE OF CONTENTS .....</b>	<b>PAGE NO.</b>
AFFIDAVIT OF JOHN MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES MEMORANDUM OF COSTS AND ATTORNEY FEES AND MOTION FOR AWARD OF ATTORNEY FEES, FILED DECEMBER 31, 2015 .....	1518
DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016.....	1533
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES), FILED JANUARY 8, 2016 .....	1535
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016.....	1537A
MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1537B
DECLARATION OF JOHN MAGNUSON IN SUPPORT OF MOTION TO STRIKE, FILED JANUARY 8, 2016 .....	1538
NOTICE OF HEARING, FILED JANUARY 8, 2016 .....	1541
WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016 .....	1542
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016.....	1545
WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016.....	1584
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....	1587

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS..... PAGE NO.**

**VOLUME 7**

BRIEF OF WASHINGTON FEDERAL IN SUPPORT OF OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016 .....	1590
REPLY BRIEF OF WASHINGTON FEDERAL TO MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW, FILED JANUARY 19, 2016 .....	1638
REPLY BRIEF OF WASHINGTON FEDERAL TO DEFENDANT HULSEY'S MOTION TO STRIKE, FILED JANUARY 19, 2016 .....	1644
NOTICE OF APPEAL, FILED JANUARY 22, 2016 .....	1694
REQUEST FOR ADDITIONAL CLERK'S RECORD, FILED FEBRUARY 4, 2016 .....	1711
NOTICE OF TRANSCRIPT LODGED, FILED MARCH 7, 2016 .....	1714
MEMORANDUM DECISION AND ORDER REGARDING DEFENDANT'S MOTION TO STRIKE, PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS AND DEFENDANT'S MOTION FOR ATTORNEY FEES, FILED APRIL 11, 2016.....	1715
JUDGMENT, FILED APRIL 21, 2016.....	1724
NOTICE OF APPEAL, FILED APRIL 29, 2016 .....	1727
AMENDED NOTICE OF APPEAL, FILED MAY 2, 2016.....	1735
NOTICE OF CROSS-APPEAL, FILED MAY 6, 2016.....	1757
ORDER ADDRESSING SUBSEQUENT NOTICES OF APPEAL AND CROSS APPEAL AND ORDER TO CONSOLIDATE AND AMEND TITLE, FILED MAY 25, 2016 .....	1766
CLERK'S CERTIFICATE.....	1768
CLERK'S CERTIFICATE OF EXHIBITS.....	1770

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**TABLE OF CONTENTS ..... PAGE NO.**

**NOTICE OF COMPLETION, FILED JUNE 16, 2016 ..... 1774**

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

**VOLUME 1**

ACCEPTANCE OF SERVICE BY ATTORNEY, FILED FEBRUARY 19, 2014 .....	51
ACCEPTANCE OF SERVICE BY ATTORNEY, FILED FEBRUARY 26, 2014 .....	145
AFFIDAVIT OF JIM KOON RE: MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014.....	147
AFFIDAVIT OF JIM KOON RE: MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014.....	225
AFFIDAVIT OF JOHN F MAGNUSON, FILED MARCH 10, 2014 .....	222
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014 .....	49
AFFIDAVIT REGARDING LITIGATION GUARANTEE, FILED MARCH 10, 2014 .....	158
AMENDED VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED FEBRUARY 25, 2014.....	83
CLERK'S RECORD ON APPEAL .....	A1
INDEX OF RECORD .....	C1
LIS PENDENS, FILED MARCH 10, 2014 .....	155
MEMORANDUM OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES IN RESPONSE TO PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER, FILED MARCH 10, 2014 .....	213
MOTION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014 .....	47
NOTICE OF APPEARANCE, FILED FEBRUARY 19, 2014 .....	53



**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

OBJECTION OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES TO PLAINTIFF'S SUBMISSIONS, FILED MARCH 10, 2014 .....	220
REGISTER OF ACTIONS.....	1
STIPULATION, FILED MARCH 13, 2014 .....	234
SUPPLEMENTAL AFFIDAVIT OF ROY CUZNER IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER, FILED FEBRUARY 25, 2014 .....	55
TABLE OF CONTENTS .....	B1
VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED JANUARY 31, 2014.....	15

**VOLUME 2**

ACKNOWLEDGE OF SERVICE BY ATTORNEY, FILED APRIL 24, 2014 .....	392
AFFIDAVIT OF SERVICE, FILED MARCH 21, 2014 .....	301
AFFIDAVIT OF VICKI MUNDLIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014.....	453
AFFIDAVIT OR ROY CUZNER WITH REGARD TO MERGER OF WASHINGTON FEDERAL WITH SOUTH VALLEY BANK AND TRUST, FILED JULY 3, 2014 .....	445
ANSWER OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES TO SECOND AMENDED COMPLAINT, FILED MAY 23, 2014 .....	411
COURT MINUTES RE: 3-17-2014 MOTION FOR APPOINTMENT OF RECEIVER.....	258
ERRATA TO NOTICE OF APPEARANCE, FILED APRIL 3, 2014 .....	308
MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	430

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

NOTICE OF APPEARANCE ON BEHALF OF MORNING STAR LODGE OWNERS ASSOCIATION, FILED MAY 7, 2014 .....	404
NOTICE OF APPEARANCE, FILED APRIL 2, 2014 .....	305
NOTICE OF APPEARANCE, FILED MARCH 21, 2014 .....	302
NOTICE OF PLEADINGS IN COURT RECORD IN SUPPORT OF WASHINGTON FEDERAL'S MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	441
ORDER ALLOWING PLAINTIFF TO FILE ITS SECOND AMENDED COMPLAINT, FILED APRIL 10, 2014 .....	311
ORDER APPOINTING RECEIVER, FILED MARCH 17, 2014 .....	282
ORDER REGARDING APPOINTMENT OF RECEIVER AND PROPERTY MANAGER, FILED MARCH 17, 2014 .....	259
PROTECTIVE ORDER, FILED APRIL 30, 2014 .....	394
RECEIVER'S MONTHLY REPORT FOR MAY 2014, FILED JUNE 11, 2014 .....	419
REQUEST FOR TRIAL SETTING, FILED MAY 5, 2014 .....	400
RESPONSE TO REQUEST FOR TRIAL SETTING, FILED MAY 13, 2014 .....	407
SECOND AMENDED VERIFIED COMPLAINT AND APPLICATION FOR APPOINTMENT OF RECEIVER, FILED APRIL 14, 2014 .....	316
STIPULATION FOR ENTRY OF PROTECTIVE ORDER, FILED APRIL 17, 2014 .....	382
WASHINGTON FEDERAL'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FILED JULY 3, 2014 .....	433

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

**VOLUME 3**

AFFIDAVIT OF AMOUNT DUE, FILED SEPTEMBER 9, 2014.....	777
AFFIDAVIT OF JOHN F MAGNUSON, FILED JULY 30, 2014 .....	619
AFFIDAVIT OF JOHN MAGSNUSON IN SUPPORT OF MOTION FOR RECONSIDERATION, FILED SEPTEMBER 11, 2014 .....	800
COURT MINUTES RE: 7-21-2014 SCHEDULING CONFERENCE .....	575A
COURT MINUTES RE: 8-18-2014 MOTION FOR SUMMARY JUDGMENT.....	730
DECLARATION OF DAVID RINNING IN SUPPORT OF STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED AUGUST 8, 2014.....	654
DECLARATION OF MICHAEL R HULSEY, FILED AUGUST 4, 2014 .....	629
DEFENDANTS' BRIEF IN OPPOSITION TO WASHINGTON FEDERAL'S MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 4, 2014.....	637
DISCLOSURE OF EXPERT WITNESSES, FILED AUGUST 12, 2014.....	719
JUDGMENT AND DECREE OF FORECLOSURE, FILED AUGUST 18, 2014 .....	736
MOTION FOR RECONSIDERATION OF "ORDER RE: EXTENSION OF LEASES", FILED SEPTEMBER 4, 2014 .....	770
MOTION IN AID OF OBJECTION TO STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES, FILED JULY 30, 2014 .....	613
NOTICE OF COMPLIANCE WITH EXPERT WITNESS DISCLOSURES, FILED AUGUST 12, 2014.....	727
NOTICE OF INTENT TO COMPENSATE, FILED SEPTEMBER 9, 2014 .....	783
NOTICE OF TRIAL, FILED JULY 25, 2014 .....	586

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

OBJECTION TO MOTION FOR RECONSIDERATION, FILED SEPTEMBER 8, 2014.....	773
ORDER DENYING RECONSIDERATION, FILED SEPTEMBER 18, 2014 .....	809
ORDER DISMISSING SILVER MOUNTAIN CORPORATION AND MORNING STAR LODGE OWNERS ASSOCIATION, FILED AUGUST 11, 2014.....	717
ORDER RE: EXTENSION OF LEASES, FILED AUGUST 21, 2014.....	743
ORDER TO PERMIT RECEIVER TO EXTEND LEASES, FILED JULY 25, 2014.....	583
RECEIVER'S MONTHLY REPORT FOR AUGUST 2014, FILED SEPTEMBER 4, 2014.....	758
RECEIVER'S MONTHLY REPORT FOR JULY 2014, FILED AUGUST 26, 2014.....	746
RECEIVER'S MONTHLY REPORT FOR JUNE 2014, FILED JULY 29, 2014 .....	593
RECEIVER'S MONTHLY REPORT FOR SEPTEMBER 2014.....	811
REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF "ORDER RE: EXTENSION OF LEASES", FILED SEPTEMBER 11, 2014 .....	797
SECOND AFFIDAVIT OF JOHN MAGNUSON RE: OBJECTION TO STIPULATION TO PERMIT RECIEVER TO EXTEND LEASES, FILED JULY 29, 2014 .....	604
STIPULATION FOR ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE, FILED AUGUST 18, 2014 .....	732
STIPULATION TO DISMISS SILVER MOUNTAIN CORPORATION AND MORNING STAR LODGE OWNERS ASSOCIATION, FILED JULY 17, 2014.....	573

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

STIPULATION TO PERMIT RECEIVER TO EXTEND LEASES,  
FILED JULY 23, 2014 ..... 576

WASHINGTON FEDERAL'S REPLY BRIEF TO DEFENDANTS' BRIEF  
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT,  
FILED AUGUST 6, 2014..... 649

WASHINGTON FEDERAL'S RESPONSE TO HULSEY'S REPLY  
MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION, FILED SEPTEMBER 12, 2014 ..... 804

WASHINGTON FEDERAL'S RESPONSE TO MOTION IN AID OF  
OBJECTION TO STIPULATION TO PERMIT RECEIVER TO  
EXTEND LEASES, FILED AUGUST 6, 2014 ..... 643

WRIT OF EXECUTION, ISSUED SEPTEMBER 9, 2014 ..... 780

**VOLUME 4**

AFFIDAVIT OF AMOUNT DUE, FILED JANUARY 7, 2015 ..... 874

COURT MINUTES RE: 11-17-2014 STATUS HEARING ..... 844

COURT MINUTES RE: 11-3-2014 PRETRIAL CONFERENCE..... 827

COURT MINUTES RE: 4-13-2015 MOTION TO TERMINATE  
RECEIVERSHIP ..... 1046

DECLARATION OF DAVID RINNING IN SUPPORT OF MOTION FOR  
TERMINATION OF RECEIVERSHIP, FILED APRIL 9, 2015 ..... 1030

DISCLOSURE OF EXPERT WITNESS, FILED MARCH 10, 2015 ..... 972

EXPERT WITNESS DISCLOSURE BY DEFENDANT'S SM  
COMMERCIAL AND HULSEY, FILED FEBRUARY 11, 2015 ..... 918

MEMORANDUM IN SUPPORT OF DEFENDANT'S OBJECTION AND  
MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF ATTORNEY'S FEES AND COST,  
FILED JANUARY 5, 2015 ..... 874A

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

NOTICE OF BANKRUPTCY CASE FILING (DEFENDANT SM COMMERCIAL PROPERTIES), FILED OCTOBER 30, 2014 .....	824
NOTICE OF ENTRY OF BANKRUPTCY COURT ORDER AUTHORIZING FORECLOSURE, FILED JANUARY 2, 2015.....	869
NOTICE OF ENTRY OF ORDER OF DISMISSAL OF SM COMMERCIAL PROPERTIES, FILED FEBRUARY 17, 2015 .....	935
NOTICE OF INTENT TO COMPENSATE, FILED APRIL 6, 2015 .....	1007
NOTICE OF INTENT TO COMPENSATE, FILED FEBRUARY 13, 2015 .....	925
NOTICE OF INTENT TO COMPENSATE, FILED MARCH 6, 2015 .....	960
NOTICE OF TRIAL, FILED JANUARY 23, 2015.....	897
ORDER APPROVING RECEIVER'S FINAL REPORT AND DISCHARGING RECEIVER, FILED APRIL 23, 2015 .....	1047
RECEIVER'S FINAL REPORT AND ACCOUNTING, FILED APRIL 9, 2015 .....	1020
RECEIVER'S MONTHLY REPORT FOR FEBRUARY 2015.....	978
RECEIVER'S MONTHLY REPORT FOR JANUARY 2015, FILED FEBRUARY 5, 2015 .....	904
RECEIVER'S MONTHLY REPORT FOR MARCH 2015, FILED APRIL 3, 2015 .....	992
RECEIVER'S MONTHLY REPORT FOR OCTOBER AND NOVEMBER 2014, FILED DECEMBER 30, 2014 .....	845
RECEIVER'S MONTHLY REPORT FOR DECEMBER 2014.....	880
REQUEST FOR TRIAL SETTING FOR DETERMINATION OF DEFICIENCY LIABILITY, FILED JANUARY 7, 2015.....	877



**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

RESPONSE OF DEFENDANT’S HULSEY AND SM COMMERCIAL PROPERTIES TO PLAINTIFF’S REQUEST FOR TRIAL SETTING FOR DETERMINATION OF DEFICIENCY LIABILITY, FILED JANUARY 14, 2015 .....	894
STIPULATION TO ENTRY OF ORDER ON RECIEVER’S “NOTICE OF INTENT TO COMPENSATE”, FILED MAY 1, 2015 .....	1062
WRIT OF EXECUTION AND NOTICE OF LEVY, RETURNED UNSATISFIED, FILED NOVEMBER 4, 2014.....	828
WRIT OF EXECUTION, RETURNED SATISFIED IN FAVOR OF PLAINTIFF, FILED MARCH 5, 2015 .....	940

**VOLUME 5**

AFFIDAVIT AUTHENTICATING BANKRUPTCY COURT HEARING TRANSCRIPT, FILED SEPTEMBER 17, 2015 .....	1312
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF PLAINTIFF WASHINGTON FEDERAL’S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 15, 2015.....	1218
COURT MINUTES RE: 8-17-2015 PRETRIAL CONFERENCE.....	1160
COURT MINUTES RE: 9-9-2015 STATUS HEARING.....	1161
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES EXHIBIT LIST, FILED SEPTEMBER 10, 2015 .....	1164
DISCLOSURE OF TRIAL WITNESSES BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 10, 2015 .....	1162
FIRST SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESS, FILED MAY 11, 2015 .....	1158
FIRST SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESS, FILED MAY 6, 2015 .....	1068

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

PLAINTIFF WASHINGTON FEDERAL'S DISCLOSURE OF TRIAL WITNESSES, FILED SEPTEMBER 11, 2015.....	1179
PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 15, 2015 .....	1206
PLAINTIFF WASHINGTON FEDERAL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED SEPTEMBER 11, 2015.....	1182
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 15, 2015 .....	1296
SUPPLEMENTAL TRIAL WITNESS DISCLOSURE STATEMENT OF PLAINTIFF WASHINGTON FEDERAL, FILED SEPTEMBER 14, 2015.....	1203
TRIAL BRIEF ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED SEPTEMBER 15, 2015 .....	1304
WASHINGTON FEDERAL'S TRIAL BRIEF, FILED SEPTEMBER 11, 2015.....	1191
WASHINGTON FEDERAL'S TRIAL EXHIBIT LIST, FILED SEPTEMBER 11, 2015.....	1169

**VOLUME 6**

AFFIDAVIT OF JOHN MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES MEMORANDUM OF COSTS AND ATTORNEY FEES AND MOTION FOR AWARD OF ATTORNEY FEES, FILED DECEMBER 31, 2015 .....	1518
AFFIDAVIT OF ROY CUZNER IN SUPPORT OF WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016.....	1545

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1486
AFFIDAVIT OF TERRY COPPLE IN SUPPORT OF WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....	1587
COURT MINUTES RE: 9-22-2015 COURT TRIAL.....	1360
DECLARATION OF JOHN MAGNUSON IN SUPPORT OF MOTION TO STRIKE, FILED JANUARY 8, 2016 .....	1538
DEFENDANT'S HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1355
DEFENDANT'S OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 23, 2015 .....	1461
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES FIRST AMENDED EXHIBIT LIST, FILED SEPTEMBER 17, 2015 .....	1337
DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF WASHINGTON FEDERAL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, FILED SEPTEMBER 17, 2015.....	1342
DEFENDANTS MOTION TO STRIKE, FILED OCTOBER 20, 2015.....	1452
DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016.....	1533
FINAL JUDGMENT, FILED DECEMBER 23, 2015.....	1508
MEMORANDUM DECISION, FILED NOVEMBER 13, 2015 .....	1464
MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1537B

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

<b>INDEX OF RECORD .....</b>	<b>PAGE NO.</b>
MEMORANDUM OF COSTS AND ATTORNEY FEES ON BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510
MEMORANDUM OF COSTS AND ATTORNEYS' FEES, FILED DECEMBER 23, 2015 .....	1482
MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED DECEMBER 31, 2015 .....	1510A
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES), FILED JANUARY 8, 2016 .....	1535
NOTICE OF HEARING, FILED JANUARY 8, 2016 .....	1541
PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE, FILED OCTOBER 21, 2015 .....	1459
POST-TRIAL BRIEFING ORDER, FILED SEPTEMBER 25, 2015 .....	1369
POST-TRIAL OPENING BRIEF OF DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, FILED OCTOBER 7, 2015 .....	1400
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED DECEMBER 23, 2015 .....	1479
WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, FILED JANUARY 5, 2016 .....	1537A
WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED GIBLER, FILED JANUARY 11, 2016 .....	1584
WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS, FILED JANUARY 11, 2016 .....	1542
WASHINGTON FEDERAL'S POST-TRIAL BRIEF, FILED OCTOBER 7, 2015 .....	1372

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

WASHINGTON FEDERAL'S RESPONSE TO DEFENDANTS MOTION  
TO STRIKE, FILED OCTOBER 21, 2015 ..... 1456

**VOLUME 7**

AMENDED NOTICE OF APPEAL, FILED MAY 2, 2016..... 1735

BRIEF OF WASHINGTON FEDERAL IN SUPPORT OF OBJECTION AND  
MOTION TO DISALLOW ATTORNEYS' FEES AND COSTS,  
FILED JANUARY 11, 2016 ..... 1590

CLERK'S CERTIFICATE OF EXHIBITS..... 1770

CLERK'S CERTIFICATE..... 1768

JUDGMENT, FILED APRIL 21, 2016..... 1724

MEMORANDUM DECISION AND ORDER REGARDING  
DEFENDANT'S MOTION TO STRIKE, PLAINTIFF'S MOTION  
FOR ATTORNEY FEES AND COSTS AND DEFENDANT'S  
MOTION FOR ATTORNEY FEES, FILED APRIL 11, 2016..... 1715

NOTICE OF APPEAL, FILED APRIL 29, 2016 ..... 1727

NOTICE OF APPEAL, FILED JANUARY 22, 2016 ..... 1694

NOTICE OF COMPLETION, FILED JUNE 16, 2016 ..... 1774

NOTICE OF CROSS-APPEAL, FILED MAY 6, 2016..... 1757

NOTICE OF TRANSCRIPT LODGED, FILED MARCH 7, 2016 ..... 1714

ORDER ADDRESSING SUBSEQUENT NOTICES OF APPEAL AND  
CROSS APPEAL AND ORDER TO CONSOLIDATE AND AMEND  
TITLE, FILED MAY 25, 2016 ..... 1766

REPLY BRIEF OF WASHINGTON FEDERAL TO DEFENDANT  
HULSEY'S MOTION TO STRIKE, FILED JANUARY 19, 2016 ..... 1644

**SUPREME COURT NO. 43936 DISTRICT COURT NO. CV-2014-55**

**INDEX OF RECORD ..... PAGE NO.**

REPLY BRIEF OF WASHINGTON FEDERAL TO MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO DISALLOW, FILED JANUARY 19, 2016 .....	1638
REQUEST FOR ADDITIONAL CLERK'S RECORD, FILED FEBRUARY 4, 2016 .....	1711

SEP 17 2015

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

TIME: 5 AM/PM  
Jana Smith  
DEPUTY CLERK

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor  
by merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually;  
SM COMMERCIAL PROPERTIES,  
LLC, an Idaho limited liability company;  
JOHN and JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

CASE NO. CV-14-055

**DEFENDANTS MICHAEL R.  
HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST  
AMENDED EXHIBIT LIST**

COME NOW Defendants Michael R. Hulsey and SM Commercial Properties, LLC, by and  
through their attorney of record, John F. Magnuson, and pursuant to the Idaho Rules of Civil  
Procedure and the Court's July 25, 2014 "Notice of Trial Setting and Pretrial Order," and hereby  
disclose those exhibits they intend to offer at trial. The Defendants intend to offer those exhibits set

DEFENDANTS MICHAEL R HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST AMENDED EXHIBIT LIST - PAGE 1

forth on the Exhibit List attached hereto as Exhibit A. In addition, Defendants reserve the right to present as exhibits at trial all exhibits identified by Plaintiff in its pre-trial disclosures. The First Amended Exhibit List attached hereto supersedes the Exhibit List filed with the Court on September 10, 2015.

DATED this 17<sup>th</sup> day of September, 2015.



JOHN F. MAGNUSON

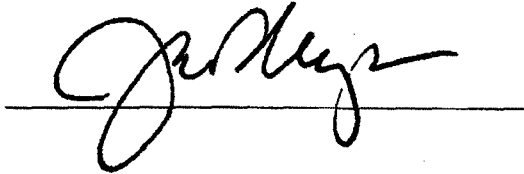
Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE  
(208) 386-9428



HULSEY-WA FED.EXS.DISCLOSURE-AMEND.wpd

DEFENDANTS MICHAEL R HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST AMENDED EXHIBIT LIST - PAGE 2



## DEFENDANTS' AMENDED EXHIBIT LIST

Washington Federal v. Michael R. Hulsey, et al.

Shoshone County Case No. CV-14-055

September 22, 2015

Honorable Fred M. Gibler, District Judge

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
A	Promissory Note (August 30, 2005)					
B	Business Loan Agreement (August 30, 2005)					
C	Deed of Trust (August 30, 2005)					
D	Assignment of Rents (August 30, 2005)					
E	Change in Terms Agreement (December 15, 2010)					
F	Change in Terms Agreement (June 27, 2011)					
G	Change in Terms Agreement (September 20, 2011)					
H	Change in Terms Agreement (February 28, 2012)					
I	Change in Terms Agreement (July 16, 2012)					
J	South Valley Loan History (December 31, 2013)					
K	Redemption Deed (May 12, 2011)					
L	Redemption Deed (May 17, 2013)					

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
M	Mundlin/South Valley Bank & Trust Engagement (July 11, 2012)					
N	Cuzner to Hulsey e-mail (October 21, 2013)					
O	Hulsey to Cuzner e-mail (October 28, 2013)					
P	Cuzner to Hulsey e-mail (October 29, 2013)					
Q	Cuzner to Nguyen e-mail (December 13, 2013)					
R	Nguyen to Cuzner e-mail (December 13, 2013)					
S	Nguyen to Cuzner e-mail (December 13, 2013)					
T	Nguyen to Cuzner e-mail (December 13, 2013)					
U	Real Estate Purchase and Sale Agreement (August 13, 2013)					
V	Real Estate Purchase and Sale Agreement (November 19, 2014)					
W	Stipulation to Permit Receiver to Extend Leases (July 22, 2014)					
X	Order to Permit Receiver to Extend Leases (July 25, 2014)					
Y	Judgment and Decree of Foreclosure (August 18, 2014)					
Z	Receiver's Final Report and Accounting (April 4, 2015)					

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
AA	Winterstar Valuations, Inc. Appraisal (February 7, 2005)					
BB	Ed Morse, MAI Appraisal (May 5, 2015)					
CC	Ed Morse, MAI Appraisal Update (September 16, 2015)					

HULSEY-WA FED.EXS.DISCLOSURE-AMEND.EXA.wpd

**FILED**  
STATE OF IDAHO  
COUNTY OF SHOSHONE / SS

SEP. 17 2015

TIME: 5 AM/PM  
Lava Jones  
DEPUTY CLERK

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**DEFENDANTS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFF  
WASHINGTON FEDERAL'S  
MOTION IN LIMINE TO EXCLUDE  
EVIDENCE**

COME NOW Defendants Michael R Hulsey and SM Commercial Properties, LLC, by and  
through their attorney of record, John F. Magnuson, and respectfully submit this Memorandum in  
opposition to the "Motion in Limine to Exclude Evidence" filed by Plaintiff Washington Federal on  
or about September 15, 2015.

**I. INTRODUCTION.**

Plaintiff Washington Federal has moved for entry of an order in limine claiming that many

**DEFENDANT'S MEMORANDUM IN OPPOSITION  
TO PLAINTIFF WASHINGTON FEDERAL'S MOTION  
IN LIMINE TO EXCLUDE EVIDENCE - PAGE 1**

of Defendant's challenged exhibits are "irrelevant" and "only being offered to delay and obstruct the orderly resolution of the sole issue before the Court . . . ." See Plaintiff's Motion at p. 2. Plaintiff's Motion is disingenuous at best. Of the twenty-one (21) exhibits proffered by Defendants that are addressed in the Motion in limine, nearly one-half (or ten (10)) are actually included in Plaintiff's proposed exhibits. How is it that the Defendants can be claimed to have attempted to obfuscate or delay the trial by offering many of the same exhibits as Plaintiff?

Plaintiff further makes gross mischaracterizations to the Court as to issues determined in the Chapter 11 bankruptcy proceeding previously filed by Defendant SM Commercial Properties, LLC. In its Motion in limine, Washington Federal claims "that the parties already litigated the fair market value of the real property in Bankruptcy Court." See Motion at p. 5. Plaintiff's counsel even filed an Affidavit, wherein he avers that on December 18, 2014, the Honorable Terry L. Myers, United States Bankruptcy Judge, ruled that:

Washington Federal's appraisal valuation of the real property involved in the above-entitled litigation was accepted by the Bankruptcy Court and the one million five hundred thousand and no/100 dollars (\$1,500,000.00) value proposed by Defendants Michael R. Hulsey and SM Commercial Properties, LLC was rejected.

See Affidavit Authenticating Bankruptcy Court hearing transcript (filed September 17, 2015) at p. 2. As set forth below, Washington Federal, as with its characterization of Defendants' exhibits, takes great liberties which are unsupported by the record.

## **II. PROCEDURAL BACKGROUND.**

Pursuant to the Court's August 18, 2014 "Judgment and Decree of Foreclosure (Order of Sale)," the trial Court has retained jurisdiction as follows:

**DEFENDANT'S MEMORANDUM IN OPPOSITION  
TO PLAINTIFF WASHINGTON FEDERAL'S MOTION  
IN LIMINE TO EXCLUDE EVIDENCE - PAGE 2**

9. That the Court specifically retains jurisdiction to determine the sole remaining issue after Sheriff's sale of the fair market value of the foregoing property as of the date of the foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a deficiency judgment against Defendant Michael R. Hulsey. . . .
10. Jurisdiction of this Court is hereby expressly reserved and retained by the Court for the purpose of making such further orders as may be necessary to carry this Decree of Foreclosure into effect, correct any mathematical errors, grant accrued credits, enter a deficiency judgment against Defendant Michael R. Hulsey, if appropriate, determine any issues with regard to the winding up of the Receiver's affairs and its discharge, and for the purpose of making such other and further orders as may be necessary or desirable.

See Judgment and Decree of Foreclosure (entered August 18, 2014) at pp. 4-5.

### **III. ARGUMENT.**

#### **A. Exhibits A through I (the Loan Documents).**

Exhibits A through I consist of the following loan documents which gave rise to the dispute at issue:

<b><u>EXHIBIT:</u></b>	<b><u>DESCRIPTION:</u></b>
A	Promissory Note (August 30, 2005)
B	Business Loan Agreement (August 30, 2005)
C	Deed of Trust (August 30, 2005)
D	Assignment of Rents (August 30, 2005)
E	Change in Terms Agreement (December 15, 2010)
F	Change in Terms Agreement (June 27, 2011)
G	Change in Terms Agreement (September 20, 2011)

**EXHIBIT:****DESCRIPTION:**

- |   |                                               |
|---|-----------------------------------------------|
| H | Change in Terms Agreement (February 28, 2012) |
| I | Change in Terms Agreement                     |

See Defendants' Disclosure of Exhibits (filed September 10, 2015).

Plaintiff's claim that Defendants' proffer of Exhibits A through I ("the Loan Documents") is "totally unrelated to any fair market value issue" and "obviously . . . proposed in order to obfuscate the issues in the litigation and to extend the trial." See Plaintiff's Motion in Limine at pp. 4-5.

Set forth below is a cross-reference to the referenced exhibits ("the Loan Documents") as also included in the exhibits proffered by Plaintiff:

**PLAINTIFF'S  
EXHIBIT:****DESCRIPTION:****DEFENDANTS'  
EXHIBIT:**

- |                                  |                                                   |   |
|----------------------------------|---------------------------------------------------|---|
| 5 (at Ex. E)                     | Promissory Note (August 30, 2005)                 | A |
| 5 (at Ex. E)                     | Business Loan Agreement (August 30, 2005)         | B |
| 5 (at Ex. B)<br>and 5 (at Ex. E) | Deed of Trust (August 30, 2005)                   | C |
| 5 (at Ex. C)<br>and 5 (at Ex. E) | Assignment of Rents (August 30, 2005)             | D |
| 5 (at Ex. E)                     | Change in Terms Agreement<br>(December 15, 2010)  | E |
| 5 (at Ex. E)                     | Change in Terms Agreement (June 27, 2011)         | F |
| 5 (at Ex. E)                     | Change in Terms Agreement<br>(September 20, 2011) | G |

**PLAINTIFF'S**  
**EXHIBIT:**

**DESCRIPTION:**

**DEFENDANTS'**  
**EXHIBIT:**

5 (at Ex. E)	Change in Terms Agreement (February 28, 2012)	H
5 (at Ex. E)	Change in Terms Agreement	I

Apparently, Defendants' proffered exhibits, in the form of "the Loan Documents," are only irrelevant and obfuscatory if offered by Defendants but, on the other hand, germane and relevant if offered by Plaintiff. Plaintiff's argument is specious and wastes judicial time and resources.

The proffered evidence is acknowledged to be relevant in that it is the same evidence being proffered by both parties. Further, Idaho law is clear that the proffered evidence is relevant in three respects. First, property owners, such as the Defendants, have a right to render their opinion on the fair market value of their own property. See, e.g., Evans v. Sawtooth Partners, 111 Idaho 381, 385 (723 P.2d 925 (1986)). To the extent that Defendant Hulsey intends to rely upon the loan documents as a basis for the expression of his opinion of fair market value, said documents are relevant.

Second, "fair market value," in the current context, has been defined as follows:

[Fair market value is to be determined] by taking into account "all factors which could fairly be suggested by the seller . . . , and all counter-arguments which the buyer could fairly make . . . , to the extent you believe such matters would have been considered in the bargaining as to price."

Evans v. Sawtooth Partners, 111 Idaho at 385. Put another way, "[T]he legal definition of fair market value is what a willing buyer would pay a willing seller." Logan v. Grant Junction Associates, 111 Idaho 670, 671, 726 P.2d 782 (1986) (citing United States v. 3969.5 Acres of Land, 56 F.Supp. 831 (D.C. Idaho (1944)).



This Court is the ultimate finder of fact. This Court has the discretion to admit the "loan documents," to the extent that the same are relevant or are relied upon by the Defendants in support of their testimony, as the owners of the subject property, as to fair market value of the same.

Third, "the Loan Documents" directly bear on issues within the Court's retained jurisdiction under Paragraph 10 of the "Judgment and Decree of Foreclosure." Paragraph 10 acknowledges the Court's retained jurisdiction to determine matters that bear upon the amount of a deficiency judgment, if any, against Defendant Hulsey.

**B. The Loan History.**

Defendants' Exhibit J consists of a "Loan History" prepared by Plaintiff. The subject "Loan History" is admissible as an admission of a party-opponent. Perhaps more telling, the "Loan History" (Exhibit J) is actually another exhibit that was proffered by the Plaintiff (Exhibit 5 at Ex. E). In other words, Plaintiff once again claims that an exhibit offered by the Defendants is irrelevant and inadmissible while at the same time proposing to rely upon the same exhibit.

For the reasons stated above, the "admissibility" of the "Loan History" is within the Court's discretion, and can be given such weight as the Court determines. The "Loan History" is relevant to the issues of the owners' opinion of fair market value, the determination of fair market value, and matters within the Court's retained jurisdiction under Paragraph 10 of the Judgment and Decree of Foreclosure.

**C. The "Redemption Deeds."**

Defendants have proffered as Exhibits K and L three (3) "Redemption Deeds" evidencing Defendants' payment of sixteen thousand sixty-nine dollars and seventeen cents (\$16,069.17) in

accrued real estate taxes as against the subject property (in May of 2011) and twenty-six thousand seven hundred three dollars and eleven cents (\$26,703.11) in accrued taxes in 2013 (after the loan had matured). Exhibit L also includes a Redemption Deed evidencing further payment of thirty-one thousand six hundred seventeen dollars (\$31,617.00) in past-due taxes as of May 17, 2013, again after the loan had matured and was claimed to be in default. The Court is vested with discretion to determine the probative value of the Redemption Deeds. Defendants intend to rely upon the Redemption Deeds in the formulation of Defendants' opinion of fair market value as of March 5, 2014. The deeds suggest to the trier of fact that if the property was worth less than the amount owed on the loan, while in default, that the Defendants would not have voluntarily paid fifty-seven thousand dollars (\$57,000.00) in past-due taxes.

**D. The Mundlin Engagement Letter (Exhibit M).**

Exhibit M consists of an engagement letter between South Valley Bank (the alleged predecessor-in-interest to Washington Federal) and Vicki Mundlin, MAI, who is expected to offer expert testimony on valuation on behalf of the Plaintiff. The Exhibit is a fair and relevant basis for cross-examination of Ms. Mundlin on several grounds, including prior opinions of value, the differentiation between prior opinions of value on the same property, and the fact that she was engaged to render an opinion of value by the Plaintiff's alleged predecessor-in-interest before the loan could have been claimed to be in default.

**E. Exhibits N through T (E-mails Between Defendant Hulsey and Washington Federal and South Valley Bank).**

Exhibits N through T consist of seven (7) e-mail exchanges between Defendant Hulsey and representatives of South Valley Bank (Plaintiff's alleged predecessor-in-interest) or representatives

of Plaintiff. The Exhibits are relevant for purposes of cross-examination and for purposes of substantiating the Defendants' opinions in that they support the proposition that Defendants advised Plaintiff of a third-party offer to purchase the subject property, before this action was filed, which was then in the amount of two million dollars (\$2,000,000.00). Any weight to be given the e-mails is left to the finder of fact. However, the documents are clearly relevant for purposes of cross-examination and, where applicable, constitute admissions of an agent of a party-opponent.

**F. Exhibit AA (the 2005 Appraisal)**

Plaintiff seeks to exclude from evidence a 2005 appraisal of the subject property, commissioned by Plaintiff's alleged predecessor-in-interest, wherein the MAI appraiser concluded that the value of the subject property, for purposes of South Valley Bank's extension of credit to Defendants, was two million three hundred thousand dollars (\$2,300,000.00). The appraisal further substantiates Defendant Hulsey's purchase of the subject property at two million three hundred seventy-eight thousand dollars (\$2,378,000.00).

The appraisal, as an admission of an agent of a party-opponent, is clearly admissible. The weight to be ascribed to the appraisal is left to the finder of fact. The appraisal may be given less weight by the trier of fact given its effective date in proximity to the foreclosure sale date. However, the appraisal does form a basis, in part, for the Defendants' expression of their opinion of fair market value and establishes the cost of the subject property. These factors directly bear on the issue of the fair market value of the subject property. The information further directly corroborates the third-party offers received by Defendants, pre-foreclosure, in the amounts of two million dollars (\$2,000,000.00) and \$1.5 million, respectively.

**IV. ADDITIONAL ARGUMENTS ADVANCED  
BY PLAINTIFF SHOULD BE REJECTED.**

**A. The Admissibility of Third-Party Offers.**

Plaintiff has invariably suggested, in its pre-trial submissions, that the third-party offers received by Defendants pre-foreclosure (Exhibits U and V) may be inadmissible. In support of its position, Plaintiff cites Oregon-Washington R. & Nav. Co. v. Campbell, 34 Idaho 601 (1921). In Oregon-Washington, the Court, sitting in a condemnation case, declined to admit the property owner's oral testimony of an unaccepted third-party offer to purchase the property in question. The holding in the case has subsequently been limited in the context of deficiency judgment actions. See Evans v. Sawtooth Partners, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986). Plaintiff did not cite Evans v. Sawtooth Partners.

In Evans v. Sawtooth Partners, the Idaho Court of Appeals noted that the Court in Oregon-Washington excluded evidence "of an unaccepted offer to purchase property" for purposes of showing fair market value in a condemnation action. Evans v. Sawtooth Partners, 111 Idaho at 384. The Evans v. Sawtooth Partners, Court noted that the Oregon-Washington Court did not elaborate upon the evidence offered or upon the perceived problems that might result from its admission.

The Evans v. Sawtooth Partners Court specifically determined not to extend the holding in Oregon-Washington beyond its apparent rationale. The Court held, in the context of an accepted written third-party offer, proffered for purposes of showing fair market value, that the evidence would be admitted and that the trier of fact could give it such weight as he or she thought it deserved. The Evans v. Sawtooth Partners Court noted that its view was consistent with the thrust of IDJI 712, which tells jurors "to determine fair market value by taking into account 'all factors which could

fairly be suggested by the seller . . . , and all counter-arguments which the buyer could fairly make . . . , to the extent that you believe such matters would have been considered in the bargaining as to price.” Evans v. Sawtooth Partners, 111 Idaho at 385.

**B. The Inapplicability of Collateral Estoppel.**

In the context of a motion in limine, Plaintiff seeks to argue, for the first time, that the doctrine of issue preclusion through collateral estoppel now establishes the fair market value of the subject property as of the foreclosure sale date. In support of this argument, Plaintiff relies upon a decision by the U.S. Bankruptcy Judge Terry Meyers in the context of a Chapter 11 proceeding filed by SM Commercial Properties, LLC, a co-Defendant in this proceeding. Plaintiff’s argument is disingenuous and constitutes a patent misrepresentation of the U.S. Bankruptcy Court’s decision. That decision, and the context within which it arose, can be found at Plaintiff’s proposed Exhibits 5 through 8.

In short, SM Commercial Properties, LLC moved for relief under Chapter 11. Washington Federal in turn argued that the amount of the indebtedness then outstanding was one million four hundred eighty-seven thousand five hundred seventeen dollars and sixty-two cents (\$1,487,517.62) plus accrued interest and attorney fees, taking the amount above one million five hundred thousand dollars (\$1,500,000.00). See Exhibit 5, p. 4. Washington Federal further argued that SM Commercial Properties had no equity in the property given the alleged fair market value as claimed by Washington Federal under its MAI appraisal (seven hundred eighty thousand dollars (\$780,000.00)). See Exhibit 7, pp. 10-11.

SM Commercial Properties provided the Court with evidence of a third-party offer to purchase the subject property for \$1.5 million. Id. Washington Federal argued that, even if the \$1.5 million offer was determinative of fair market value, that there was no equity in the property. Id. At pp. 11-12.

Significantly, the Court made no determination of the fair market value of the property. The Court's task, in Chapter 11 proceedings, is to determine whether or not the debtor (SM Commercial Properties) had any equity in the property that could form the basis for a successful reorganization plan. The Bankruptcy Court did not determine the fair market value of the property for deficiency purposes. The Court held, inter alia, as follows:

[E]ven if the Cox Group proposal [the third-party offer for \$1.5 million] would be considered, the offer now and the Washington Federal debt are both approximately \$1.5 million. It's in the vernacular, a push, and that's before considering other claims that may be secured by the property, including HOA liens.

See Exhibit 7, p. 12.

For collateral estoppel to apply, "The issue decided in the prior litigation [must be] identical to the issue presented in the present action." Kootenai Electric Cooperative, Inc. v. Lamar Corp., 148 Idaho 116, 219 P.3d 440 (2009). The issues weren't identical.

The issue in the Bankruptcy Court was whether or not SM Commercial Properties, as the Chapter 11 debtor, had "equity" in the property that could form the basis for a successful plan of reorganization. Since the third-party offer of \$1.5 million "was a push" with the amount claimed owing by Washington Federal, the Court simply determined there was no equity in the property. A determination of whether or not there was "equity" in the property is not a determination as to the "fair market value" of the property.

The "fair market value of the property" can be argued to equal that proposed by the third-party offeror, the Cox Group, which was \$1.5 million. That would result in a determination by this Court that there was no deficiency. There can be no equity in the property (as determined by the Bankruptcy Court) and no deficiency. However, these are two wholly-separate and distinct issues, and the Bankruptcy Court made no determination as to the fair market value of the subject property. The Bankruptcy Court did nothing more than to find that even if it considered the \$1.5 million offer, that there was no "equity" in the property given the amount claimed owing by Washington Federal.

With all due respect, it strains credulity for Washington Federal to claim that the Defendants are obfuscating the issues while at the same time seeking to exclude exhibits identical to those proffered by Washington Federal and by plainly mischaracterizing what the Bankruptcy Court determined. This is made all the more evident by the Affidavit of counsel which seeks to authenticate the Bankruptcy Court's transcript. That Affidavit, dated September 16, 2015, alleges, under oath, that Judge Meyers, "in open Court," ruled "that Washington Federal's appraisal valuation of the real property . . . was accepted by the Bankruptcy Court and the one million five hundred thousand dollars value proposed by Defendants Michael R. Hulsey and SM Commercial Properties, LLC was rejected." See Affidavit Authenticating Bankruptcy Court Hearing Transcript at p. 2. The Court can review the transcript (Plaintiff's Exhibit 7) and make its own determination.

#### V. CONCLUSION.

Based upon the reasons and authorities set forth above, Defendants respectfully request that Plaintiff's Motion in Limine be denied in its entirety.

DATED this 17<sup>th</sup> day of September, 2015.




JOHN F. MAGNUSON  
Attorneys for Defendants  
SM Commercial Properties, LLC and  
Michael R. Hulsey

CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
      HAND DELIVERED  
      OVERNIGHT MAIL  
  X   FACSIMILE - 208\386-9428



HULSEY-WA FED-OPP.BRF.wpd



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 SEP 17 PM 3:06

PEGGY WHITE  
CLERK DIST. COURT  
BY *[Signature]*  
DEPUTY  
By Fax

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor  
by merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually;  
SM COMMERCIAL PROPERTIES,  
LLC, an Idaho limited liability company;  
JOHN and JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

CASE NO. CV-14-055


**DEFENDANTS MICHAEL R.  
HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST  
AMENDED EXHIBIT LIST**

COME NOW Defendants Michael R. Hulsey and SM Commercial Properties, LLC, by and through their attorney of record, John F. Magnuson, and pursuant to the Idaho Rules of Civil Procedure and the Court's July 25, 2014 "Notice of Trial Setting and Pretrial Order," and hereby disclose those exhibits they intend to offer at trial. The Defendants intend to offer those exhibits set

DEFENDANTS MICHAEL R HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST AMENDED EXHIBIT LIST - PAGE 1

forth on the Exhibit List attached hereto as Exhibit A. In addition, Defendants reserve the right to present as exhibits at trial all exhibits identified by Plaintiff in its pre-trial disclosures. The First Amended Exhibit List attached hereto supersedes the Exhibit List filed with the Court on September 10, 2015.

DATED this 17<sup>th</sup> day of September, 2015.

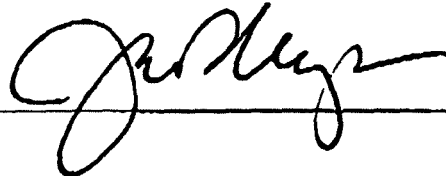
  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
      HAND DELIVERED  
      OVERNIGHT MAIL  
  X   FACSIMILE  
(208) 386-9428

  
\_\_\_\_\_

HULSEY-WA PED.EXS.DISCLOSURE-AMEND.wpd

DEFENDANTS MICHAEL R HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC'S FIRST AMENDED EXHIBIT LIST - PAGE 2

**DEFENDANTS' AMENDED EXHIBIT LIST****Washington Federal v. Michael R. Hulsey, et al.****Shoshone County Case No. CV-14-055****September 22, 2015****Honorable Fred M. Gibler, District Judge**

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
A	Promissory Note (August 30, 2005)					
B	Business Loan Agreement (August 30, 2005)					
C	Deed of Trust (August 30, 2005)					
D	Assignment of Rents (August 30, 2005)					
E	Change in Terms Agreement (December 15, 2010)					
F	Change in Terms Agreement (June 27, 2011)					
G	Change in Terms Agreement (September 20, 2011)					
H	Change in Terms Agreement (February 28, 2012)					
I	Change in Terms Agreement (July 16, 2012)					
J	South Valley Loan History (December 31, 2013)					
K	Redemption Deed (May 12, 2011)					
L	Redemption Deed (May 17, 2013)					

Page 2

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
M	Mundlin/South Valley Bank & Trust Engagement (July 11, 2012)					
N	Cuzner to Hulsey e-mail (October 21, 2013)					
O	Hulsey to Cuzner e-mail (October 28, 2013)					
P	Cuzner to Hulsey e-mail (October 29, 2013)					
Q	Cuzner to Nguyen e-mail (December 13, 2013)					
R	Nguyen to Cuzner e-mail (December 13, 2013)					
S	Nguyen to Cuzner e-mail (December 13, 2013)					
T	Nguyen to Cuzner e-mail (December 13, 2013)					
U	Real Estate Purchase and Sale Agreement (August 13, 2013)					
V	Real Estate Purchase and Sale Agreement (November 19, 2014)					
W	Stipulation to Permit Receiver to Extend Leases (July 22, 2014)					
X	Order to Permit Receiver to Extend Leases (July 25, 2014)					
Y	Judgment and Decree of Foreclosure (August 18, 2014)					
Z	Receiver's Final Report and Accounting (April 4, 2015)					

Page 3

No.	Description	Admitted By Stip.	Offered	Rec'd	Refused	Reserve Ruling
AA	Winterstar Valuations, Inc. Appraisal (February 7, 2005)					
BB	Ed Morse, MAI Appraisal (May 5, 2015)					
CC	Ed Morse, MAI Appraisal Update (September 16, 2015)					

HULSEY-WA FED.EXS.DISCLOSURE-AMEND.EXA.wpd

**COURT MINUTES**  
**CV-2014-0000055**  
**Washington Federal vs. Michael R Hulsey, etal.**  
**Hearing type: Court Trial**  
**Hearing date: 9/22/2015**  
**Time: 8:45 am**  
**Judge: BEN SIMPSON**  
**Courtroom: District Courtroom 3rd Floor**  
**Court reporter:**  
**Minutes Clerk: TARA**  
**Tape Number:**

Log#	SPEAKER	PHASE OF CASE
903	J	CALLS CASE ALL ATTORNIES PRESENT, MICHAEL HULSEY AND LLOYD CUSNER REPRESENTATIVE OF BANK, REVIEWED FILES DATE OF FORCLOSURE 3/5/15
	JFM	CORRECT
	TC	CORRECT
	J	TITLE
	JFM	TITLE OF PLT
	J	LLC
	JFM	CORRECT
	J	AGMT OF PARTIES
	JC	FORCLOSURE EXH 39 MARKED, 1,000,000 PRINCIPLE
	J	DISAGREE
	JFM	AMT GIBLERGAVE DEF DISAGREES
	J	FAIRMARKET VALUE
	JFM	CORRECT
	TC	AGMT READ ON RECORD, PLT EXH 23, PLT 24, PLT 31, PLT 39 WILL NOT BE ADMITTED, DEF EXH AGREED U, V, W, X, Y, Z ARE ADMITTED W/O PROOF, MTN IN LIMINE
	JFM	CONCUR
	TC	MOVE TO EXCLUDE WITNESSES, MTN IN LIMINE
	J	RULE ON THEM AS THEY COME UP
	TC	OFFER TO SHOW BANRUPTCY, THEY ARE ATTACHED
	J	UNDERSTAND DISPUTE BETWEEN PARTIES, ANYTHING ELSE
	TC	EXCLUDE WITNESSES
	J	FINE
	TC	EXHIBITS APPROACH CLERK
	J	YES
	TC	REMAINING ISSUE IS FAIRMARKET VALUE, FORECLOSURE STIP JDMT, EXH 39 IS BAL DUE, TAKING PRINCIPLE
	J	SEEK FEES
	TC	CORRECT
	J	JFM

914	JFM	DISAGREEMENT BURDEN OF PROOF IN PLT,
	J	WITNESS
	TC	VICKY
	CLK	SWEARS IN
	VM	VICKY MONLAND, COMMERCIAL REAL ESTTE FIRM, APPRAISE THRU IDAHO, SANDPOINT AREA, WA FED HIRED TO APPRAISE BLD, LOAN OFFICER, PREPARED NATTARTIVE IN THIS MATTER EXH 22, PAGE 75 CERTIFICATE OF APPAISER, WORKING ON MORNING STAR PROPERTY, ISPECTED IT SEVERAL TIMES, NOTHING CHANGED, ON BUNKER AVE, NEWEST AND BEST IN KELLOGG, BASE OF SM RESORT, ID NON DISCLOSURE STATE, 9 COMM CONDOS STONG LEASES, 2 LEASED KIND OF A STUGGLED TO PAY RENT, HAVE BEEN PAID REAL ESTATE TAXES, MONTH TO MONTH BASIS, HIGH TAXES, RENT BEING PD TO LENDER, , 24% VACANCY, 69,000 YR END FOR CONDOS, 69,000 IF BUY, 2011 THINGS OCCOPUNCY SLID TO 70,000 FRM 122, 000, 2014 INCOME OF 69,000, RANGED FRM 64,000 TO 69,000 A YR, PAGE 36 SUMMARY FEE ANALYSIS, RENT IN PLACE TRIPLE NET BASIS, OPERATING EXPENSE OF 80,000, 64,000 ESTIMATE, CAPITAL RATE, CONCIRM SALE PRICE, INVESTIMATE PAY 780,000 VALUE ON 3/5/15, 2 <sup>ND</sup> METHOD PROP FORCLOSED, ADJUST RENT TO MARKET, PAGE 38, MOVED INCAP SPACE, INCLUDE HOTEL LOBBY, ADJ RENT DOWN, ADJ SKI SHOP RENT, AND TWO RESTURANT RENT, ADD REIMB, 143,000 INCOME, 765,000 CAME UP WITH,
942	JFM	LEADING OBJ
	J	SUBSTAINED
	TC	VALUE OF SALE
	VM	STORES CAN FEED OFF EACH OTHER TO MAKE WORK, MADE AWARE OF OFFER ON PROPERTY BEFORE DID THIS IN 2013 FOR 2 MILION AND 2.5 MILLIOON IN 2014, 9 UNITS SHOULD BE SOLD AS PACKAGE, OFFERS NEVER CAME OF EVERYTHING, RESORT STRUGGLING,
946	TC	NOTHING FURTHER
	J	JFM
	JFM	USE 36 THRU 38
	TC	NO OBJ
	JFM	GOOD MORNING
	VM	EXH 22 VACANCY RATCY BASE ON HISTORIC PERFORMANCE, 9 CONDIMUMS, RELEASED ON SM, NEVER VACATED SINCE CONSTRUCTED, SM NEVER MISSED PYMT, HAPPENS IN MALLS IN MUTLI BLDG, UNIT 1 HOTEL LOBBY SALES OFFICE, UNIT 1 SOLD ALONE AT 10% CAME UP TO GET RATE AS WHOLE INSTEAD OF SEPARATE, RATE OF GIFT SHOP EXPIRES IN 2017, OPTION RENEWALS 3 YRS, PAGE 29, LEASE UNIT2, LEASE EXTENSIONS TO 2023, BIKE STORAGE TO 2023, RETAIL SHOP 2018, JANITORIAL

		2025, ALL LEASED BY SM CORP STRUGGLING BUT NOT GOING ANYWHERE, RETAIL SHOP WOULD BE HIRE, CAME UP VACANCY AS WHOLE NOT SEPARATE, DIDN'T INCLUDED 1/5 MILLION FROM COX IN SUMMARY, HULSEY FILED FOR BANKRUPTCY WHEN DID REPT,
	JFM	TAKE U AN V MARK
	TC	NO OBJ
	JFM	ADMITED BY STIP
	VM	RECOGNIZE DISCRPTION AS APPRAISED, INCLUDED UNIT 8, APPRAISED 4 TIMES,
	TC	OBJ INTERRUPTING
	J	LET HER ANS
	VM	DID TALK TO MR KOON, TALKE TO REAL ESTATE AGENT, TALKED TO REAL ESTATE IN 11/2014 APPRAISAL, OFFER FAILED THE SELLER FILED TO SHOW INVESTIMATE, IN REPORT , NOONE TOLD ME ABOUT OFFERS, IF KNOWN ABOUT EXH U AN V WOULD HAVE TO DISCLOSE, BASED UPON INCOME, 69,000 CAPITAL RATE WOULD BE HIGH IF EVALUATED THAT BUY OF 1.5 MILL, PROP IS LISTED NOT SURE WAS OPTION AT ONE POINT,
	J	WHAT TAKING ABOUT UNIT 9 OR RESORT
	JFM	9 UNITS
1011	VM	DON'T THINK LISTED NOW, EVAL RE MGMT FEE 10% RENT, HOA REIM, BROKER 10%, IF SHOW UNITS YOU HAVE TO DRIVE OVER, 1 <sup>ST</sup> EVAL 2012 INCLUDED 4% MGT FEE WAS ERROR TO LOW, KOON LIVED IN CDA, 850 A MONTH, KOON MGMT COMM PROP, COMP, EXH 26
	J	ADMIT BY STIP
	JRM	CORRECT
	VM	EXH A MGMT EXPERIENCE AND ACCOUNTS, MANAGES DEPOT IN CDA, SINGLE UNIT AND MULTI UNITS IN CDA, CHRGD 850 A MONTH FOR PROP, REASONABLE RATE, PRP TAX ISSUE HIGH IN SHOCO IN ALL OF ID, PAGE 23 WAS 1 MILL EACH YR, TAXES ALONE ON 9 UNITS WAS 32,000 DOLLARS, ANALYSIS EXPENSES, SPEAK TO JERRY WHITE AS OF MARCH 2015, USED 8.25 CAP RATE , EXPENSES AS 9 UNITS NOT WHOLE, SALE AS 1 UNIT, 780,000 GO FILE PROP TAX APPEAL, 9 UNITS TOETHER IS 780,000, ASSESSIRS AND APPRAISERS DON'T ALWAYS AGREE, TAX BURDEN 780,000, 57 %, DODNT KNOW WHAT ASSESSOR WLL DO,
1030	TC	OBJ ARGUING
	J	OR
	VM	LOOKING AT PAGE 36, STILL INCOME COMING IN REST LEASES, WILDCAT PIZZA SUITE 8 PAGE 6 DOLL SQ FOOT, MARKET WOULD SUGGEST PAY 12%, USED WHAT COLLECTING, COFFEE SHOP WOULD USE SAME NUMBERS, PROP ON BTM OF MARKET, CAN ONLY GO UP, LARGE RESORT TO MAKE HAPPEN,
	JFM	MARK EXH DD



1035	TC	DICLOSE NOT STIP NEVER SEEN
	JFM	MARK ONLY
	J	EMPEACHMENT ONLY
	JFM	YES
	VM	ICNLUSED SM RENT, GROSS 120,000 SAME NUMBER HAD ON MY ANALYSIS, REDUCE BY 77,000 POTENTIAL INCOME IS 13,000 LESS THAN MY NUMBER, GROSS INCOME, USED MY 22% TO UNITS NEVER BEEN VACATED, GOT MGMT FEE OF 850 THAT KOON CHARGED , MATH SHOWS 1 MILLION DOLLARS
	JFM	EXH 2 FOR EMPEACHMENT PURPOSES
	TC	OBJ
	J	OVR
	JFM	EXH 2 VARIES UING MARKET VAL OF 0%
	VM	MATH COMES TO 1 MILL DOLLARS,
	JFM	EXH FF USING RENT OF WILD CAT AND CAFÉ PUT IN MARKET RENT
	VM	SEE THAT, FILL UNIT AT SOME PT, 5% AND USE 2% 1,349,000 DOLL, HAVENT ADJ CAP RT, KELLOGG IS A RES MARKET,
	JFM	EXH GG MARK FOR EMPEACHEMENT
	LVM	COMES TO 1MILL 4, USING MY ANALY,
	FJM	EXH HH COME TO 1,3
	VM	CORRECT
	JFM	ANALGY ARE DIFFERENT, EXH II, 1,114,000 EXH
	VM	CORRECT
	JFM	OFFER
	TC	OBJ
	J	OVR REVELANCE GOES TO LUSTRATIVE PURPOSES ONLY SHOW DIFFERENCE IN ANAGALIES, WIT HAS AGGREGED WITH CHANGE, DD THRU II ARE ADMITTED FOR ALLISTRATIVE PURPOSE ONLY, 10 MIN BREAK
1104	J	BACK ON RECORD REDIRECT
	TC	YES
	VM	PLT EXH 1, PAGE 3 READ PARA 4, EXH U AND V, SOLD AS 1 UNIT, SOLD SEP
	JFM	SPEC OBJ
	J	OVR
	VM	ONE LOT BECAUSE TO CONTROL VILLAGE, SHOULD OF HAVE INT IN RESORT, ON EXH U
	JRM	OBJ LEAADIING
	J	SUB LEADING
	VM	THEY ARE NOTES, CLSOING DTES SUBJ TO NEVER CLOSED, 2MIL OFFER SEPT 27, 2013 NEVER SOLD RESORT, IT DROPPED IN 1996 X 12MO 23952, TAKE OFF MAGMT FEE 10%, REVENUE LOSS 21,557 ROUNDED, USING 8 CAP 2 THOUS RT LOSS, RENT DROPPED CONSESSIONS ASKING FORSHADE TO LOWER RENT,

		CONSISTANT, LOOKING AT PAGE 63, EXH 22, JIM KOON MANAGED MANAGER OF RECEIVER, CAP RT LOWER THAN KOON'S, WOULD TAKED TO WHITE ASSESSOR, HULSEY DIDN'T FOLLOW THRU APPEAL,
116	JFM	OBJ
	J	ALLOW TO ANS GOES TO WEIGHT
	TC	NOTHING FURTHER
1120	J	RE CROSS
	JFM	YES
	J	NEVER SAW EXH UNTIL A WEEK AGO, DIDN'T KNOW ABOUT THEM WOULD HAVE TO INCLUDE THEM WHEN DID MY ANALYSIS, SEPT 1 WOULD NOT KNOW ABOUT IT, NOONE TOLD ME ABOUT CHANGES , IF BURYING SHOULD LOOK AT INCOME COMEING IN,
	JFM	SHOWING EXH JJ MARKED
	VM	HAVENT SEEN LETTER WAS A OPINION
	TC	ADMIT JJ
	JFM	YS
	J	ADMIT
	JFM	NOTHING FURHTER
	TC	NOTHING FURHTER
	J	STEP DOWN,
	TC	SUBJECT TO RECALL
	J	FREE TO LEAVE WITH PH NUMBER
	TC	TALK TO WITNESS FOR A MOMENT
	J	YES
	TC	CALL ROY KOSNER
	CLK	SWEARS IN
1143	RK	VP ON WA FED, KENMORE WA, WORK WITH CREDITORS IN TROUBLE, AWARE OF LOAN IN MATTER, AUG 2013, DO TO DUTES AT WA FED, EXH 39, TIS EXH IS FORCLOSURE DECREE BEG ON 12.8, WAS CREDIT BID, BID WAS 765,000, RENT IS CRETIED 9,000, DUE AND OWEING TOTAL DUE 76,000
	TC	ADMIT
	JFM	NO OBJ
	J	ADMIT EXH 39
	JFM	CROSS
1138	RK	ALL LOANS, WA FED DIDN'T PLACE VAILE ON LOAN, WAS NOT DISCOUNTED, LOAN BAL MATURITY DATE AS 9/5/12, 1 MONTH AFTER WE GOT MATURING, REACHED MY DESK
	TC	OBJ
	J	OVR
	JFM	EXH J
	RK	SEEN BEFOE PREPARED THIS, SUMMARY OF PYMTNS WE MADE TO SOUTH VALLEY BANK AND FEW FOR WA FED, EXH 5 IN PLT

		BK, PREPARED
1145	JFM	OFFER J
	TC	OBJ
	J	GOES TO HULSEY OPINION, OVR ADMT
	RK	NOT SURE IF LISTED, NO INTENTION TO LIST, WORKED WITH 5 BANK IN THE LAST 5 YRS, THIS ONLY BANK IN ID, LOAN DED OF TRUST JUDICALLY, FORCLOSED PROP MY DECISION, NON JUDICAL LESS COST, BELIEVED EQUIATY IN PROPERTY,
	JFM	NOTHING FURHTER
	TC	REDIRECT
1150	RK	PROTECT RENT,
	JFM	HULSEY SM PROPERTY FIELD CHPT 11,
	RK	AWARE OF THAT AND OBJECTERD
	J	STEPP DOWN AND BREAK FOR LUNCH COME BACK AT 1;15
116	J	BACK ON RECORD
	TC	NO FURTHER REST
	JFM	CALL MICHAEL HULSEY MH
	CLK	SWEARS IN
	MH	DEF IN CASE, WENT TO 12 TO 15 DIFFERENT SCHOOL, LEFT HOME AT 15 AND LIVED IN LAS VEGAS AND WORKED ON OIL RIG AND FINISHED HIGH SCHOOL, GOT DRAFTED, EDUCATION CAME FROM ARMY, MILITARY EXPERIENCE DIDN'T LIKE IT, PLAYED BASEBALL FOR ARMY, JOIN NAT GUARD AS MIL POLICE, AT 20 YRS OLD TOOK TEST FOR LAPD, WENT TO ACADEMY, DID PATROL FOR 3 YRS, EXCEPTED TO METRO, DID STAKEOUTS, BOUGHT RESORT SOLD AFTER 3 YRS, GAVE LEAVE OF ABSENCE WORK WITH FED GOV, RESORT HANDS ON, LAPD BUYING APTS IN NEWPORT BEACH, HAD RESIDENTAL PROP, SOLD RESORT EARLY 80'S, GOT MY REAL ESTATE LISCENCE IN OR, GOT TIED UP WITH SHOP REALORS DEVELOPED ALBERTSONS, KINDERCARE, BROKER STILL IN OR AND CA, STAY INVOLVED IN MNGING PROP, PLT EXH 30 BARGAIN SALES DEED, SM COMM PROP LLC ID MY IDAHO CO, IT INCLUDES PROP DISCUSSING TODAY, I AM SOLE PERSON OF LLC AND MANAGER, USE LLC TO DIFERT LIABILITY, IM PARTY ON SUNVLLEY BANK, CONDOS WERE NOT COMPLETE JST STARTED CONSTRUCTION WHEN PURCHASED, LEASE DESCRIBE , 2,380,000 FINANCED 1,000,000 FRM SV BANK, WITH GELL WHEN, CLOSED IN 2004, MANAGED PROP, WORKED WITH TENANTS, WILDCAT PIZZA NOT THERE WHEN PURCHASED, FIRST TENANT SHORTLY AFTER CLOSSING, 7V, OPEN HAIR SALON TANNING AND MASSAGE, THEN SECOND TENNAT DIDN'T MAKE IT, NO ADVERTISEMENT ALLOWED, UNIT 5 SUNSHINE MINE 2 YRS, REL EARLY FROM LEASE, EPA CAME IN WITRH REDUCED RATE OF 660 AMO,
140	TC	OBJ LEADING
	J	SUB

141	MH	MTN CAFE AND PIZZA THERE WHOLE TIME, GOT SALON GOING AGAIN, JOE WIN MADE THINGS DIFFICULT , DOC EXH A PROMISING NOTE,
	JFM	OFFER EXH S
	TC	MTN IN LIMINE REVELANT
	J	OFFER FOR OANLY OWNERS ON VALUE
	JFM	CORRECT
	J	OVR
	MH	LOOKING AT EXH I, CHG OF TERMS AGMT,
	JFM	EXH I
	TC	NO OBJ
	J	ADMITTED
	MH	NEVER MISSED PYMT GOT BEHIND ON PROP TAXES BUT DID GET CAUGHT UP,
	JFM	OVER A ND L
	TC	YES
	J	OVR DMITTED
	JFM	PD 82,000 IN TAXES
	MH	LOAN MATURED IN 2012, TRIED TO GET STMT ON LOAN AMT, SV BANK TAKING OVER BY WA FED, OFFER IN APPRAISER IS HALF PRICE, 1.5 OFFER IS STILL ON GOING, EXH U AND V, OWED BY MOTHER AND STEP FATHER, VACATE NOW, IT DID HAVE TENANTS DISCOVERY CENTER AND JOE WIN, MEET WITH DAN COX DRIVE TO MASCOV DISCUSSED BUYING PROP NEEDS TO GO WITH RESORT, HE AGREED, NEVER ABLE TO GET FINALIZATION FROM JOE WEN, COPY OF LEASES, EXH V, DAN COX AND I KEPT CONTACT RE PURCHASING PROP PUT UP 2 MILL DOLLARS DEPOSIT,, FAIR MARKET VALUE FROM 2015 SGINED DEAL OF 5,000,000 THOUGHT MORE THAN THAT, USE CAP RATE OF 6
200	JFM	NOTHING FURHTER
	TC	DIRECT
	MH	DISPO , TERRIBLE PROP MGMT, THERE IS A PLAZA THAT SEPARATES THE STREET AND COFFEE, JOE BAD MGMT, JOE STOPPED EVERYTHING WANTED TO DO WITH PROPERTY, KCON HELPED A LITTLE WHEN PURCHASED PROP, I CONSULTED WITH HIM, HE TOLD ME NOT TO BUY BUT ALREADY SIGNED, HE SAID SV STRUGGLING, APPROACHED TENANTS TO BUY INTERESTED BUT DIDN'T SELL TO THEM, REC'D NO BUYERS, EXH JJ BROKER EVAL FROM JIM KOON 2014 BROCKERS OPIN ASSOC WITH PROP HE HAD SIGNS UP BUT I DID THE LEASING, BROKER OPINION EVAL CAP RATE OF 11% , APPROVED LETTER BEING SENT, LOOKING AT 2 <sup>ND</sup> PARAGRAPH ON 1 <sup>ST</sup> PAGE,
222	JFM	OBJ
	TC	EXSIMATION
	J	ALLOW

	MH	WA FED BE TRUTHFUL, WAS SETTLEMENT OFFER, KOON DID BROKER OPINION NOT APPRAISER, EXH U PAGE 6 , PROPERTY NEEDS TO GO WITH RESORT, DAN COX TRYING TO BUY RESPORT DON'T KNOW IF CRAZY BUT TRYING TO BUY, NEVER CONVERTED TO CASH OR ESCROW, DAN COX M,EMBER OF DIAMOND LLC, NOT IN CHPTER 11 BANKRUPTCY, SM LLC IN BANKRUPTCY NOT ME PERSONALLY, DIDN'T GET APPROVAL FROM BANRUPTCY CORP, LIFT STAY AND FILED BANKRUPTCY, FILED MTN TO LIFT STAY
229	JFM	OBJ MISTATES
	J	SUB FORM OF QUESTION
	MH	PD PROP TAXES,
	JFM	OBJ LEGAL CONCLUSS LACKS FOUND
	J	SUB
	MH	60,000 NEVER PD IN HOA FEES, UNIT 8 HS NOT SOLD, DON'T KNOW, MOTHER PASSED AWAY AND NOT SURE WHAT HUSBAND DID, UNIT 8, WEN TRIED TO FORCE SERVE BEER OUTSIDE ONLY INSIDE CONFLICT WITH AGMT WTH WEN, WERE IN COMPUTATION WITH WEN WITH PIZZA AND CAFÉ, ADVERTISED IN LOBBY WS REFUSED, ,
239	JFM	REDIRECT
	MH	SEEN PARTS OF APPRAISAL, LOOKING AT EXH P, SEEN THIS LETTER FROM KOSNER TO HULSEY RE SETTLE OF SM RESPOR
	JFM	OFFER P
	JC	NO OBJ
	J	ADMIT
	MH	LOOKING AT JJ, WANTED TO GET DIALOG GOING, TRYING TO START NEGOTIATION,
	TC	LEADING OBJ
	J	SUB
	MH	EXH 22 APPRAISAL LOOK AT PAGE 63
	TC	OBJ
	JFM	LETTER IN SETTLEMENT
	J	SUB
	MH	SENT LETTER ON 1/28 <sup>TH</sup> , SUED AFTER SENT LETTER ON 1/31/14, DIDN'T ASK FOR CAP RATE, PROPERTY WORTH 1/5 MILLION IN MY OPINION, CPT 11 TO GIVE TIME TO PAY OF WA FED AND SELL PROP, NEW WAS GOING TO LOSE MONEY,
	JFM	NOTHING
	TC	RECROSS
	MH	MATURED IN 2012, SIGNED NUMBER OF EXTENSIONS THAT I SIGNED, IT WAS LIFTED BANKRUPTCY DODNT KNOW WHY
	J	STEP DOWN, TAKE 10 MIN BREAK
306	J	BACK ON RECORD

	JFM	REST
	TC	NO REBUTTAL, BRIEFS
	JFM	CORRECT
	J	ORDER OF COURT PREPARE ORDER COPPLE TOMY ATTENTION TO ME OR CLK CAN GET TO ME

**FILED**  
STATE OF IDAHO  
COUNTY OF SHOSHONE / SS

SEP. 25 2015

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP

TIME: Sara Jones AM/PM  
DEPUTY CLERK

Attorneys at Law  
Chase Capitol Plaza  
Post Office Box 1583  
199 North Capitol Boulevard  
Suite 600  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
tc@davisoncopples.com  
band@davisoncopples.com

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by )  
merger to South Valley Bank & Trust, )  
Plaintiff, )

Case No. CV 2014 55

vs. )

POST-TRIAL BRIEFING ORDER

MICHAEL R. HULSEY, individually; SM )  
COMMERCIAL PROPERTIES, LLC, an )  
Idaho limited liability company; SILVER )  
MOUNTAIN CORPORATION, an Oregon )  
corporation; JOHN and JANE DOES I-X; )  
and WHITE CORPORATIONS I-X, )

Defendants. )

\*\*\*

THIS MATTER having come regularly before the Court for trial on September 22, 2015,  
with Plaintiff Washington Federal appearing by and through its attorney of record, Terry C.  
Copples, for the firm Davison, Copples, Copples & Copples, LLP, and John F. Magnuson, appearing

POST-TRIAL BRIEFING ORDER - 1

1369

on behalf of Defendants Michael R. Hulsey and SM Commercial Properties, LLC, and the Court having heard the evidence and testimony presented at trial, and upon the conclusion thereof in open court, made the following order memorialized herein:

1. Plaintiff and Defendants shall file simultaneous post-trial briefs on or before October 6, 2015.

2. It is hereby further ordered that the parties are entitled to file reply briefs if they so elect on or before October 13, 2015.

DATED this 24 day of Sept, 2015.

  
Benjamin R. Simpson, District Judge



**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_ day of \_\_\_\_\_, 2015, I caused to be served a true and correct copy of the foregoing document upon the following individual, by the method indicated, and addressed as follows:

Terry C. Copple  
 Davison, Copple, Copple & Copple, LLP  
 Post Office Box 1583  
 Boise, Idaho 83701  
*Counsel for Washington Federal*

\_\_\_\_ First Class, U.S. MAIL  
 \_\_\_\_ Hand Delivery  
 \_\_\_\_ Facsimile (208) 386-9428  
 \_\_\_\_ Electronic Mail: tc@davisoncopples.com

John F. Magnuson, Esq.  
 1250 Northwood Center Court, Suite A  
 Coeur d'Alene, Idaho 83814  
*Counsel for Defendants Michael R. Hulsey  
 and SM Commercial Properties, LLC*

\_\_\_\_ First Class, U.S. MAIL  
 \_\_\_\_ Hand Delivery  
 \_\_\_\_ Facsimile (208) 667-0500  
 \_\_\_\_ Electronic Mail: john@magnusononline.com

\_\_\_\_\_  
 Clerk

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 OCT -7 PM 2: 23

PEGGY WHITE  
CLERK DIST. COURT  
BY *M. Anderson*  
DEPUTY

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	WASHINGTON FEDERAL'S POST-
vs.	)	TRIAL BRIEF
	)	
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	

\*\*\*

This Post-Trial Brief is filed by Plaintiff Washington Federal ("Washington Federal"),  
with respect to the sole remaining issue to be determined by this Court of the fair market value of

the real property involved in this litigation (“Units”), as required by Paragraphs 9 and 10 of the above-entitled Court’s August 18, 2014 Judgment and Decree of Foreclosure (Order of Sale). This matter was tried before the Court on September 22, 2015, and the parties stipulated to filing post-trial briefs. Filed concurrently herewith is the transcript of the direct and cross-examination of Michael R. Hulsey at the trial.

### **INTRODUCTION**

At the trial in the above-entitled case, Washington Federal presented the evidence of the local, long-time MAI appraiser, Vicki K. Mundlin, as well as the broker’s opinion of value from Jim Koon of the value of the Units involved in this litigation, all of which supported Washington Federal’s fair market value of the Units as of the date of foreclosure on March 5, 2015.

Defendant Michael R. Hulsey (“Hulsey”) presented no objective, expert evidence other than his own subjective opinion of value as the manager of his limited liability company, SM Commercial Properties, LLC, which was created by him to create a “layer to divert liability.” (September 22, 2015 Trial Transcript (Tr. p.11 L.9))

These facts coupled with the legal effect of the Idaho Bankruptcy Court’s Findings of Fact, Conclusion of Law and Order regarding the value of the Units of \$780,000.00 should result in a determination of this Court that the fair market value as of March 5, 2015, could, under no circumstances, be greater than \$780,000.00.

Indeed, Hulsey’s long time real estate broker, Jim Koon, was perhaps the most accurate estimator of the true value of the property of \$585,000.00 in light of the subsequent reduction in the rent for Unit 1 of the Units from \$3,999.00 per month to \$2,000.00 per month thereby reducing the overall value by at least \$204,116.00 as later illustrated in this Brief.

Nevertheless, this Court should rule that the value of the Units as of March 5, 2015, was \$780,000.00 as a result of the doctrine of collateral estoppel. The Court should also rule that even if the doctrine doesn't operate in the current circumstances, the evidence produced at trial convincingly proved that the fair market value could not possibly be more than \$780,000.00 as of March 5, 2015.

Each of the following sections of this Brief analyzes the evidence produced at trial with regard to the fair market value issue.

## **EXPERTS' EVIDENCE OF VALUE**

### **I.**

Washington Federal commissioned the MAI appraisal of the Units involved in this litigation effective as of the date of the foreclosure. This appraisal was admitted into evidence as Washington Federal Exhibit No. 22. In this appraisal, Vicki K. Mundlin concluded that the fee simple value of the property as of the date of foreclosure was \$765,000.00 because a purchaser at the foreclosure sale would be able to purchase the property free and clear of any leases of the property resulting in a net value of \$765,000.00. If the property was purchased with the leases remaining in effect, then the value of the property would be \$780,000.00.

The appraisal prepared by Ms. Mundlin is based upon her extensive experience with the Units. She testified that she had appraised the same property on multiple occasions in the past and thus was very knowledgeable with regard to the property and the local market. She explained at trial the safeguards that are taken by Washington Federal to ensure that the appraisal results are unbiased and not as a result of any influence exercised by Washington Federal. In the report she explained the many different parties she conferred with in arriving at the fair market

value of the property. Ms. Mundlin spoke with Tomlinson Sotheby's, the Receiver, Mr. Koon's office, Jerry White as the Shoshone County Assessor, John Gifford of the Pacific Northwest Ski Area, Chris Schrieber with Kiemle and Hagood in Sandpoint, as well as Pat Eberlin. Her report is detailed, understandable and based upon extensive analysis of the market trends in the area of the Units. Additionally, her conclusions are more in line with the opinion of the local real estate broker, Jim Koon, who also had extensive experience in trying to sell and lease the Units involved in this matter.

Ms. Mundlin testified that an investor's focus is on income when making a purchase decision. The historical income for the subject property has ranged from \$63,000.00 to \$70,000.00 for three of the past four years for which the information was available. The projection of income in the appraisal report was just under \$65,000.00, based on current leases in place.

Accordingly, her appraisal value should be accepted by this Court in the amount of \$780,000.00.

## II.

Ms. Mundlin appraised the Units as one group being sold as a package not only because Hulsey always marketed the Units for sale as one group but also because Hulsey and Washington Federal stipulated in the Judgment and Decree of Foreclosure in Section 4, that the property would "be sold at public auction in one lot in the manner prescribed by law and the rules and practices of the Sheriff of Shoshone County, State of Idaho..." *Page 3 of Judgment and Decree of Foreclosure, Washington Federal's Trial Exhibit No. 1.*

Exhibit "A" attached hereto and incorporated herein by reference is a copy of a page from the Mundlin appraisal showing the methodology by which she arrived at the fair market value of \$780,000.00. During the trial it was revealed that the rent payable for the best condo unit in the Units had its rent reduced pursuant to its lease renewal down to \$2,000.00 a month instead of its prior \$3,999.00. The reduction in the rent further confirmed the validity of Ms. Mundlin's analysis illustrating how weak the rental market is for a property of this type in Kellogg, Idaho. If one takes the reduced rent for Unit 1 and work the same calculations used by Ms. Mundlin in arriving at the value of the property, then the true fair market value as a result of the rent reduction would be \$575,884.00 as a result of a \$204,116.00 offset in value against the value of \$780,000.00. See the calculations attached hereto as Exhibit "B" taken from her appraisal denoted as Washington Federal's Trial Exhibit No. 22, which reflected the lower rent for Unit 1.

The overall capitalization rate used by Vicki Mundlin is eminently reasonable in light of the high risk of anyone purchasing these units in Kellogg, Idaho given the current financial circumstances of the area. Jim Koon, for example, used an overall capitalization rate of 11% which was ratified and approved by Hulsey. Ms. Mundlin used an overall capitalization rate of 8.25% given Hulsey more than the benefit of the doubt with regard to this element of computing value based upon the income approach.

Equally as compelling is Hulsey's evidence of his real estate broker's opinion of value of the Units of \$578,627.00. Mr. Koon's analysis was admitted as Hulsey Trial Exhibit No. JJ and is attached hereto as Exhibit "C." His opinion of value is important because Mr. Koon provided advice to Hulsey at the time he acquired the Units in 2005, but back then he recommended to Mr.

Hulsey that he not purchase the Units because of the depressed economy. Mr. Koon's report uses an 11% capitalization rate and the income and expense figures he used were provided by Hulsey. Hulsey wrote most of the report providing graphic detail to the Court of the terrible economic conditions in the area of the Units causing its values to be lower than desired by Hulsey.

Mr. Koon's report drafted by Hulsey states the following:

The problems are Unit 7b, Mountain Care struggles every month. All tenants other than Jeld Wen are now on month to month. Even though the leases are (were) triple net with tenant paying HOA fees and property taxes they cannot afford to pay. The Spa/Salon has been vacant for 4 months and they were approximately 6 months behind in rent. My choice is to force the tenants to pay all cost and loose [sic] them as tenants or attempt to keep their units open and occupied.

Silver Mountain has become a part time ski area and water park resort with poor customer service and a poor repartition [sic] with the local community. Large groups boycott the resort and the condo owners are in an uproar regarding management issues and high HOA fees.

It should be emphasized that Mr. Koon has been the property manager for the Units during the period of foreclosure as insisted by Hulsey. Mr. Koon's affidavit filed in this matter by Hulsey as Washington Federal's Trial Exhibit No. 26 details Mr. Koon's excellent background in real estate and property management in Northern Idaho.

In light of Mr. Koon's opinion of value, Hulsey had his attorney write to Washington Federal explaining to Washington Federal the low value of the property. He stated:

At this time, with real estate values approaching their zenith, Mr. Hulsey paid top dollar for these units based upon an escalated market and the representations of the managing and developing entities associated with Silver Mountain. . . .

\*\*\*

The value of the commercial units that stand as security for the subject loan have fallen by a factor of some seventy-five percent (75%).

\*\*\*

The security for the loan is now valued at approximately \$578,627. . . .

\*\*\*

Attached is an informal Broker's Price Opinion (BPO) from Jim Koon, the most knowledgeable commercial real estate leasing agent in Kootenai and Shoshone Counties. Mr. Koon originally assisted in the sale of the property to Mr. Hulsey. Mr. Koon has approximately twenty-five (25) years of experience in this exact market, which includes the negotiation of commercial leases and sales of commercial leaseholds. Mr. Koon's BPO shows actual annual income for the subject properties at \$125,856 and annual expenses (excluding any maintenance obligations) of \$62,707. The readily-demonstratable market value of the property is nearly \$700,000 less than the pay off demand of December 31, 2013.

\*\*\*

We believe that the value of the collateral is no greater than that suggested by Mr. Koon's BPO.

The January 28, 2014 letter from Hulsey's attorney was admitted into evidence by Hulsey and not Washington Federal. Having admitted the evidence himself, Hulsey should be bound by the opinion of Jim Koon as his own appraiser. In any event, the letter would be admissible not only as direct evidence binding on Hulsey but also for impeachment purposes under the well-established rule in Idaho announced in *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987):

We first consider whether statements made in the course of settlement negotiations may be admitted to impeach the testimony of a witness at trial. We have little difficulty holding that this is a proper use. Almost all courts who have considered the issue have ruled in favor of admissibility. See *El Paso Electric Company v. Real Estate Hart, Inc.*, 98 N.M. 570, 651 P.2d 105 (App.1982),



*cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982); *American Family Life Assurance Company v. Teasdale*, 733 F.2d 559 (8<sup>th</sup> Ci.1984); *County of Hennepin v. A.F.G. Industries, Inc.*, 726 F.2d 149 (8<sup>th</sup> Cir.1984); and *Missouri Pacific Railway Company v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983).

In similar context we have ruled that Rule 408 does not require the exclusion of evidence relating to compromises or offers to compromise when the evidence being introduced is used to show bias or prejudice. *See Soria v. Sierra Pacific Airlines, supra*, 111 Idaho at 605, 726 P.2d at 717. We see little difference when the inconsistent statement is used for impeachment purposes. The last sentence of the rule states: "[T]his rule does not require exclusion if the evidence is offered for another purpose, *such as* proving, bias or prejudice of a witness,....." (Emphasis added.) The "such as" language preceding the allowable uses clearly means that the list is not exhaustive. As stated by the Arkansas Supreme Court:

"The policy of the Rules of Evidence is 'to the end that the truth may be ascertained.' Rule 102. The purpose of Rule 408 is to promote complete candor between the parties to the settlement negotiations \*\*1256 \*110 but not to protect false representations. Thus, when a party has made a statement at trial which is inconsistent with a statement made during settlement negotiations, the inference is that one of the statements is knowingly false. In such a situation, we conclude that the mandate in Rule 102 to interpret the rules so as to foster the values of 'fairness' and 'truth' requires us to hold that prior inconsistent statements made in the course of settlement negotiations should be admitted for impeachment purposes."

Thus, we hold a trial may allow the use of statements contained in settlement negotiations for the purpose of impeaching witnesses who give contrary testimony at trial. The trial judges have broad discretion in determining admissibility of impeachment evidence, and their decision will not be overturned absent a clear showing of abuse. *Quick v. Crane*, 111 Idaho 759, 780, 727 P.2d 1187 (1986).

114 Idaho at P.109

Hulsey's own testimony at trial provides some of the best evidence as to why the value of the Units are not high and the reason why they have never sold in the ten years that Hulsey has

been vigorously trying to unload the Units. Hulsey admitted at trial that he immediately started to try to sell the Units after he purchased them in 2005 because he realized he had made a terrible mistake in purchasing the Units. All of his efforts to sell the property failed. He listed the property for sale with Jim Koon but was not successful. He tried to sell the Units to his tenants but no one wanted to buy the Units. He even marketed the Units on LoopNet and on Craigslist with no success.

He testified at trial that the existing owner of the neighboring resort, Jeld-Wen, makes it impossible to sell the Units:

I had a gentlemen, he opened a – it's a hair salon, tanning studio, massage parlor. And he would actually – he started out with Jeld-Wen's permission and agreement doing massages in the room – not him but the ladies that worked for him. And they had some people that would have parties and have massage parties. But Jeld-Wen decided that they wanted to get into that business; so they – they forbid their own from entering the condos for anything related to his business. And he ended up – financially he couldn't make it after – after that, and he closed the doors.

I re-leased it to another lady, and – but it was set about half the rent that he was paying. And she struggled just because you couldn't do anything within the condos or they wouldn't allow advertisement in the lobby or anything. So it was a difficult situation. (Tr. p.17, LL7-23)

\*\*\*

Unit 5 was the same way. I found tenants almost immediately. And it was Sunshine Mines here from Wallace. They were in the facility for about two years. And I – I let them out of their lease. Jeld-Wen started selling the same products in the business office that Sunshine Mine was trying to sell. So it just – it hurt their business and – anyway, I released them a year early from their lease.

I had my son open the store called the General Store there. We were doing well, very successful. A little store with limited hours. He, Michael, hurt – his name's Michael Brian. He was on

disability leave from the sheriff's department, Sacramento Sheriff's Department, after he'd been involved in a shooting. And he ended up going to back – or for back surgery. And I didn't want to put anybody else in there. So we ended up closing the store. (Tr. p.18, LL8-25)

\*\*\*

Then I had – the EPA, it was an engineering firm that worked with the EPA. They came in. They were in there at a reduced rate. They came in at – I think it was – I believe it was 660 a month. And it's either – I think it was 600 and maybe \$60 for HOA. It's either 660 or 600. And, anyway, they came in, and because of Jeld-Wen limiting parking, they had to vacate. They moved to another place in Kellogg. . . . (Tr. p.19, LL1-9)

\*\*\*

Well, Mountain Café and the pizza parlor were mainstays. They were there the whole time. I was able to get the salon going again. Jeld-Wen made things really difficult. I mean, extremely difficult to do business there. They would schedule a breakfast with Mountain Café that, say, 'We have a hundred businessmen coming in from Montana.' This is a true story. 'And can you supply them with breakfast? Can you open up?' And they said yeah.

They went and bought all the supplies. And nobody shows up. So Matt, one of the owners, he goes across the way, and Jeld-Wen had a buffet set up. They forgot to tell Matt that they were going to do it. And they were feeding the businessmen in the conference center. So – and it was always something similar. So it was very difficult maintaining tenants. I made rent concessions to keep them there. As far as – I mean, if I charged them the HOA's and the taxes, I would not have had one tenant there other than Jeld-Wen. . . . (Tr. p. 20, LL2-20)

### III.

Finally, Hulsey should not have a second bite at the apple on the issue of fair market value. Hulsey voluntarily filed a Chapter 11 bankruptcy proceeding in the Idaho Federal Bankruptcy Court. He admitted at trial that he was required to come up with a valuation of the Units for the purposes of litigating Washington Federal's Motion To Lift Stay. (Tr. p.57, L.6)

Just as in this trial, Hulsey presented no appraisal or other expert testimony at the Bankruptcy Court hearing. Indeed, Hulsey's bankruptcy attorney admitted in open court that Hulsey could not contest the appraisal value of Vicki K. Mundlin of \$780,000.00 with any appraisal of their own. As a result, the Court ruled based upon the uncontradicted evidence at that hearing, that Washington Federal was entitled to a lifting of the stay because the value proffered by Washington Federal of \$780,000.00 was accurate. The Court ruled in this regard as follows:

The creditor also specifically represents that it has a current MAI appraisal establishing a value of the real property at \$780,000.00.

The debtor initially argued that in August 2013 offered to purchase the property at 2 million dollars, established a higher value. At hearing, debtor represented that another newer offer to purchase the property, this time for 1.5 million dollars had been made.

It appears from the representations at the preliminary hearing that both offers were made by entities in which an individual, Dan Cox, is involved. The present offer is contingent on the purchaser acquiring not just the property owned by the debtor, but the Silver Mountain Ski area it abuts. It's also contingent on closing by January 31, 2015, some 45 days from now.

The debtor did not indicate under the local rule that Mr. Cox or others working with the offeror would be testifying witnesses at a final hearing, and specifically advised that it planned only on calling Hulsey as a witness.

The debtors' counsel also conceded that unless the Court accepted the suggestion that the 1.5 million dollar contingent offer established value that it could not otherwise contest the valuation figure offered by Washington Federal's appraiser.

On the representations required under the local rule, and given the requirements of Section 362(d), (e), and (g), Washington Federal is found to have met its burden of showing that there is no equity.

Given the inherent ambiguities, the questions and the problems with the Cox group offer, including questions about whether or not a purchase of the entire resort in 45 days is feasible, likely, or otherwise that there's a factor that affects the contingent nature of the offer, it's difficult for the Court to find that the higher value is credible and should be applied for these purposes.

Additionally, even if the Cox group proposal would be considered, the offer now and the Washington Federal debt are both approximately 1.5 million. It's in the vernacular, a push, and that's before considering other claims that may be secured by the property, including HOA liens.

So in that regard, I find that the value is likely to be less than the amount of the debt and ergo there is no equity. (Washington Federal Trial Exhibit No. 7 pp.11-12)

As argued in Washington Federal's Motion In Limine, collateral estoppel resulting in issue preclusion should apply in this matter because Hulsey had the fair opportunity to litigate the issue; it was the identical issue of the fair market value of the Units before the Court; the issue was actually decided by the Bankruptcy Court; a final, non-appealable order was entered by the Bankruptcy Court and the parties are all identical in these two proceedings. We therefore urge the Court to find that Mr. Hulsey cannot again relitigate the issue that has already been decided in a fair and open hearing in another judicial forum.

#### **HULSEY'S LACK OF EVIDENCE**

It is striking that Hulsey presented no expert testimony with regard to the value established by Vicki K. Mundlin in her appraisal. Hulsey originally disclosed in his witness disclosures to this Court as well as in his list of exhibits that Ed Morse, MAI would be testifying at trial with regard to his May 5, 2015 appraisal and his September 16, 2015 updated appraisal with his corrections to the original May 5, 2015 appraisal. See Hulsey Trial Exhibits BB and

CC. For reasons that remain unknown, Mr. Morse never testified at trial and as a result, Hulsey is left with no expert testimony to rebut the opinions of value of Ms. Mundlin or Jim Koon.

Despite having no evidence to support his owner's opinion of value that the Units were worth \$1,500,000.00 on March 5, 2015, Hulsey nevertheless asserts various grounds to support his opinion.

The following is a brief review of each one of the grounds asserted by Hulsey to support his valuation and the reasons why they are not persuasive:

1. Sale of Individual Units. Mr. Hulsey asserts that if the Units were sold separately then they would sell for a higher price. Although Vicki Mundlin disagreed with that conclusion, the Judgment And Decree Of Foreclosure compels the Units to be sold as one lot based upon the stipulation of Hulsey and Washington Federal. Accordingly, the issue is moot. In any event, Hulsey's argument is not valid because he marketed the Units over a period of ten years as one group himself. The two contracts he entered into were a sale of all of the Units as one block. Accordingly, selling them separately does not raise the value of the property in any way and no proof was brought forth by Hulsey on that point.
2. Exhibit U - Purchase And Sale Agreement. Hulsey Exhibit U is an August 13, 2013 Purchase And Sale Agreement showing a purchase price of \$2,000,000.00. In addition to not being signed by the buyer, it included Unit 8 not owned by Hulsey. Furthermore, the earnest money was never actually paid for the transaction and the resort never sold and thus the sale never closed. Thus, this failed remote 2013 transaction proved exactly the opposite intended by Mr. Hulsey. It proves that the property did not and could not sell for such an exorbitant price in the market condition prevailing in Kellogg on March 5, 2015.
3. Exhibit V - Purchase And Sale Agreement. Similarly, the November 19, 2014 Sale Agreement for \$1,500,000.00 also failed. Not only was the earnest money never paid, but the Silver Mountain Resort never was sold to this buyer and thus this transaction failed as well. Hulsey had no idea that Diamond C Ranch's entity was never formed. Also, the agreement was signed without Bankruptcy Court approval and thus was void. See 11 U.S.C. § 363. Just as with the prior Purchase And Sale Agreement, this contract proves that the property is not worth \$1,500,000.00 because it

never closed and never had any realistic chance of closing. Indeed, one could argue that the offers proffered by Hulsey were simply solicited in an effort to prove a non-existent value of \$1,500,000.00. It was for these reasons that the Bankruptcy Court rejected Hulsey's value opinion based on this "offer."

4. Redemption Deeds. Hulsey argues that he honestly believes that the property is worth \$1,500,000.00 as of the date of foreclosure because he expended approximately \$80,000.00 in saving the property from tax deeds. These exhibits show that Hulsey did not pay his real estate taxes for over six years in violation of his obligation to pay his accruing real property taxes set forth in his Deed Of Trust. See Deed of Trust denoted as Defendant's Exhibit C. Simply complying with a legal obligation to save his property does not in any way indicate the fair market value of the property. Hulsey's sincerity in believing his own opinion of value is in any event irrelevant because it is not the issue in the litigation.

Undercutting Hulsey's argument is the fact that he agreed to a \$70,000.00 settlement with his owner association for the payment of past dues but never paid his settlement amount.

5. Washington Federal Commenced Foreclosure on January 31, 2014. Hulsey somehow argues that Washington Federal precipitously filed foreclosure after the loan matured in September, 2012. Washington Federal waited seventeen (17) months to allow Hulsey to try and sell the property. As is well known now, the property never did sell and thus Washington Federal commenced foreclosure after giving more than a reasonable amount of time to Hulsey to liquidate the property and pay off the loan to Washington Federal. Accordingly, Washington Federal waiting seventeen (17) months to start foreclosure in no way supports Hulsey's valuation of \$1,500,000.00.
6. Hypothetical Exhibits EE through II. Hulsey undoubtedly recognized that because he had no expert opinion of value to give the Court to rebut the value opinions of Ms. Mundlin and Jim Koon. He instead provided the Court with a series of hypothetical values based upon mathematical calculations unrelated to any expert testimony produced at trial. These hypothetical calculations only serve to emphasize that Hulsey had no evidence at trial to support his hypothetical value of \$1,500,000.00. As a result, those calculations should be disregarded by the Court as not persuasive in any manner.

## CONCLUSION

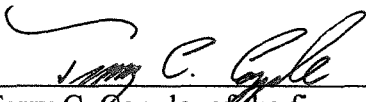
In conclusion, we therefore respectfully urge the Court to rule in favor of Washington Federal and find that the fair market value of the Units as of March 5, 2015, was the amount of \$780,000.00. If one errs in favor of the higher value determined by Vicki K. Mundlin, of using \$780,000.00, then the amount due and owing by Hulsey would be \$760,962.83 as of the date of trial of September 22, 2015, calculated as follows:

August 18, 2014, Foreclosure Decree:	\$1,487,517.62
Plus interest at 5.125% of \$208.86 per day multiplied by 199 days to March 5, 2015:	\$ 41,563.14
Total:	<u>\$1,529,080.76</u>
Less property purchase price from foreclosure sale on March 5, 2015:	(\$ 780,000.00)
Deficiency Amount Due:	<u>\$ 749,080.76</u>
Plus interest at 5.125% of \$105.18 per day from March 6, 2015 to June 30, 2015:	\$12,200.88
Plus interest at 5.375% of \$110.31 per day from July 1, 2015 to Trial date of September 22, 2015:	\$9,155.73
Less rent amounts collected by Receiver:	(\$9,474.54)
Plus attorney's fees and costs from August 18, 2014 to Trial date of September 22, 2015:	To be determined after trial Pursuant to Rule 54 filings
Total Due As Of Trial Date Excluding Attorneys' Fees And Costs:	<u>\$760,962.83</u>



DATED this 6<sup>th</sup> day of October, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

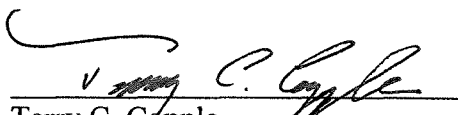
By:   
Terry C. Copple, of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7<sup>th</sup> day of October, 2015, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
Terry C. Copple

# **EXHIBIT “A”**

to

**Washington Federal’s Post-Trial Brief**

As discussed previously, the commercial buildings in Kellogg are in the process of being reassessed. A 25% reduction in the assessed value would potentially add \$8,367 to the NOI for both the Fee Simple and Leased Fee analyses. The implied overall capitalization rate increases to 9.3%, which is an attractive rate for an investments of the subject's age and quality, despite the resort town location.

### Income Approach Conclusion – Leased Fee Analysis

Based on the forecast of net operating income and the selected direct capitalization rate, the results of the direct capitalization analysis indicate a Market Value indication of **\$780,000**, developed as shown in the following table.

INCOME APPROACH TO VALUE (Leased Fee)				
Morning Star Lodge "As Is"				
<b>Gross Potential Income</b>				
<b>Rental Income</b>	<b>Area</b>	<b>Rate</b>	<b>Annual Rent</b>	
Silver Mountain Corporation	2,150 sf x	\$27.69/sf	\$59,525	
Ski Shop	1,732 sf	\$15.60/sf	\$27,012	
Suite 5 (NNN)	587 sf	\$8.00/sf	\$4,696	
Wildcat Pizza (NNN)	1,393 sf x	\$6.30/sf	\$8,773	
Mountain Café & Espresso (NNN)	1,112 sf x	\$3.78/sf	\$4,205	
<u>Suite 7c (NNN)</u>	<u>1,393 sf</u> x	<u>\$12.00/sf</u>	<u>\$16,716</u>	
<b>Gross Potential Rental Income</b>	<b>8,367 sf</b>	<b>\$14.45/sf</b>		<b>\$120,927</b>
<b>Expense Reimbursements</b>	8,367 sf x	\$7.83/sf		<u>\$65,491</u>
<b>Total Potential Gross Income</b>				<b>\$186,418</b>
<b><u>Vacancy Allowance</u></b>	<u>\$186,418</u> x	<u>22.00%</u>		<u>-\$41,012</u>
<b>Total Effective Gross Income</b>				<b>\$145,406</b>
<b>Operating Expenses</b>				
<b>Reimbursed Expenses</b>				
Real Estate Taxes RD	8,367 sf x	\$3.83/sf	\$32,023	
Insurance	8,367 sf x	\$0.21/sf	\$1,757	
Utilities (HOA)	8,367 sf x	\$3.69/sf	\$30,874	
<u>Maintenance &amp; Repairs</u>	<u>8,367 sf</u> x	<u>\$0.10/sf</u>	<u>\$837</u>	
Subtotal	8,367 sf	\$7.83/sf	\$65,491	
Management Fee	\$145,406 x	10.0%	\$14,541	
			\$0	
<u>Replacement Reserves</u>	<u>8,367 sf</u> x	<u>\$0.10/sf</u>	<u>\$837</u>	
<b>Total Operating Expenses</b>	8,367 sf x	\$9.67/sf		<u>-\$80,868</u>
<b>Net Operating Income</b>				<b>\$64,538</b>
<b><u>Capitalization Rate</u></b>				<u>8.25%</u>
<b>Indicated Value</b>				\$782,279
<b>Rounded to nearest \$5,000</b>				<b>\$780,000</b>

As a test of reasonableness, I have considered the existing income in place based on my analysis of revenues and expenses provided by the Receiver for this analysis. This summary, previously used in the estimate of operating expenses, is presented on the following page with a projected net operating income at 2014 year-end of \$68,591.

This income has little risk and represents the subject's current cash flows. The implied overall capitalization rate is 8.8%, which is well within the range of overall capitalization rates from the sale comparables.

# **EXHIBIT “B”**

to

**Washington Federal’s Post-Trial Brief**

# INCOME APPROACH TO VALUE (Leased Fee)

## Morning Star Lodge "As Is"

### Gross Potential Income

Rental Income	Area	Rate	Annual Rent
Silver Mountain Corporation	2,150 sf x	\$27.69/sf	\$59,525
Ski Shop	1,732 sf	\$15.60/sf	\$27,012
Suite 3 (NNN)	587 sf	\$8.00/sf	\$4,696
Wildcat Pizza (NNN)	1,393 sf x	\$6.30/sf	\$8,773
Mountain Cafe & Espresso (NNN)	1,112 sf x	\$3.78/sf	\$4,205
Suite 7c (NNN)	1,393 sf x	\$12.00/sf	\$16,716
<b>Gross Potential Rental Income</b>	<b>8,367 sf</b>	<b>\$14.45/sf</b>	<b>\$120,927</b>
Expense Reimbursements	8,367 sf x	\$7.83/sf	\$65,491
<b>Total Potential Gross Income</b>			<b>\$186,418</b>
<u>Vacancy Allowance</u>	<u>\$186,418 x</u>	<u>22.00%</u>	<u>-\$41,012</u>
<b>Total Effective Gross Income</b>			<b>\$145,406</b>
<b>Operating Expenses</b>			
<b>Reimbursed Expenses</b>			
Real Estate Taxes RD	8,367 sf x	\$3.83/sf	\$32,023
Insurance	8,367 sf x	\$0.21/sf	\$1,757
Utilities (HOA)	8,367 sf x	\$3.69/sf	\$30,874
<u>Maintenance &amp; Repairs</u>	<u>8,367 sf x</u>	<u>\$0.10/sf</u>	<u>\$837</u>
Subtotal	8,367 sf	\$7.83/sf	\$65,491
Management Fee	\$145,406 x	10.0%	\$14,541
			\$0
<u>Replacement Reserves</u>	<u>8,367 sf x</u>	<u>\$0.10/sf</u>	<u>\$837</u>
<b>Total Operating Expenses</b>	<b>8,367 sf x</b>	<b>\$9.67/sf</b>	<b>-\$80,868</b>
<b>Net Operating Income</b>			<b>\$64,538</b>
<u>Capitalization Rate</u>			<u>8.25%</u>
<b>Indicated Value</b>			<b>\$782,279</b>
<b>Rounded to nearest \$5,000</b>			<b>\$780,000</b>

### Rent Loss

12 x \$1,999 \$23,988

-\$5,277

\$18,711

-\$1,871

\$16,840

\$0

\$204,116 Effect on Value

# **EXHIBIT “C”**

to

**Washington Federal’s Post-Trial Brief**

JOHN F. MAGNUSON  
ATTORNEY AT LAW

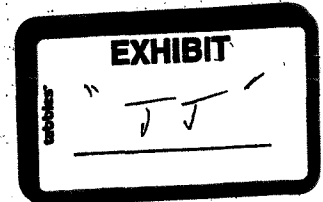
ADMITTED IN IDAHO AND WASHINGTON

TELEPHONE  
208•667•0100

FAX  
208•667•0500

P.O. Box 2350  
1250 NORTHWOOD CENTER COURT  
SUITE A  
COEUR D'ALENE  
IDAHO 83816

January 28, 2014



Terry C. Copple, Esq.  
Davison, Copple, Copple & Copple, LLP  
199 N. Capital Blvd., Ste. 600  
P.O. Box 1583  
Boise, ID 83701

VIA E-MAIL AND U.S. MAIL

Re: Michael R. Hulsey/South Valley Bank & Trust/Washington Federal

Dear Terry:

I write on behalf of Michael (Mike) Hulsey. I acknowledge receipt of your letter of January 10, 2014, the loan documents you kindly forwarded, and the forwarded copy of Mr. Cuzner's December 5 letter (received January 22).

As you are aware, this transaction originated in 2005 between Mr. Hulsey and South Valley Bank & Trust. Mr. Hulsey purchased several condominiumized commercial units at the base of Silver Mountain in Kellogg, Idaho. At the time, with real estate values approaching their zenith, Mr. Hulsey paid top dollar for these units based upon an escalated market and the representations of the managing and developing entities associated with Silver Mountain.

I appreciate the loan history you provided to me. If you had an opportunity to review it, you will note that Mr. Hulsey has never defaulted in the performance of his obligations under the Note. Prior to your client's acquisition of the loan, the loan was extended multiple times by agreement between Mr. Hulsey and South Valley Bank.

Regrettably, over the eight (8) years that have passed since the initial extension of credit, several adverse factors have intervened with respect to the local real estate market. Please consider the following:

- (1) The commercial and residential real estate markets in Shoshone County, in particular, were hit harder than most. The value of the commercial units that stand as security for the subject loan have fallen by a factor of some seventy-five percent (75%).
- (2) The developer and operator of Silver Mountain, Jeld Wen, has determined to take its losses rather than to continue to operate a financially-beleaguered project. The last report I received was that the resort could be purchased for approximately \$8.5 million, including a water park that was constructed before the Great Recession at a cost of some \$30 million. The purchase price also includes the entire development, with gondolas, chair lifts, equipment, lodge facilities, and acres and acres of skiable terrain.
- (3) The only tenant of Mr. Hulsey's that is not currently on a month-to-month basis is Jeld Wen. However, the Jeld Wen Leases are up for renewal soon and, if Jeld Wen does not sell the property to a party who wishes to negotiate and enter into new leases, the property pledged as security to Washington Federal will become a virtual ghost town.

Against this background, I was somewhat surprised when I received your January 10 letter that seemed to chastise Mr. Hulsey for not paying off the loan at maturity or for blaming his plight on others (which he has never done). Mr. Hulsey had a good working relationship with South Valley Bank. However, the hard facts are what they are, the market is what it is, and blood can't be squeezed from a turnip.

We are really at a crossroads. We regret that. However, with no extension in sight, and the loan at maturity, all options must be analyzed. Hypothetical options include the following:

- (1) Mr. Hulsey pays the loan.
- (2) Mr. Hulsey defaults and Washington Federal forecloses.
- (3) The parties reach some alternative resolution to take out the loan.

Each of these options is discussed separately below.

First, Washington Federal has demanded that Mr. Hulsey pay off the loan. For the reasons set forth above, it isn't quite that simple. The security for the loan is now valued at approximately \$578,627. This is based upon an eleven percent (11%) capitalization rate and actual current income.



While Mr. Hulsey wishes Washington Federal no ill will, even if he could pay the loan, it might not be in his best interests. However, we don't need to approach that moral dilemma, because paying off the loan simply isn't an available option.

The second option would be for Washington Federal to foreclose. However, in light of our discussion of option three (below), I don't think this is realistic or beneficial. Attached is an informal Broker's Price Opinion (BPO) from Jim Koon, the most knowledgeable commercial real estate leasing agent in Kootenai and Shoshone Counties. Mr. Koon originally assisted in the sale of the property to Mr. Hulsey. Mr. Koon has approximately twenty-five (25) years of experience in this exact market, which includes the negotiation of commercial leases and sales of commercial leaseholds. Mr. Koon's BPO shows actual annual income for the subject properties at \$125,856 and annual expenses (excluding any maintenance obligations) of \$62,707. The readily-demonstrable market value of the property is nearly \$700,000 less than the pay off demand of December 31, 2013.

If Washington Federal forecloses, then it will have the "opportunity" to own and manage this troubled commercial investment, and succeed to the liability for the readily-demonstrable tax obligations, insurance obligations, CAM expenses, and maintenance obligations. This is all to obtain the benefit of a vacant space, some month-to-month leases, and some expiring leases with an out-of-state entity trying to unload a seasonal ski resort.

Of course, Washington Federal could pursue entry of a post-foreclosure deficiency judgment. And if things really got to that point, then Mr. Hulsey could pursue a bankruptcy petition (and likely would if left with no other option). At the end of the day, there are obvious benefits to Washington Federal in trying to work out an amicable resolution reflective of the realities (realities which neither Mr. Hulsey nor Washington Federal created), is a better approach.

That leads us to the third hypothetical option: to work out a resolution short of foreclosure. We believe that the value of the collateral is no greater than that suggested by Mr. Koon's BPO. We would also like you to consider the following. First, Mr. Hulsey never missed a payment under this loan prior to Washington Federal's acquisition of the loan. The only payments then missed, so to speak, was the recent payment sent back by cover of your letter last week. Mr. Hulsey has not run from the matter and has kept proactively-involved.

Second, your January 10 letter stated that we had advised that the Silver Mountain Resort was going to be sold on several prior occasions. That is the information we were also provided. Obviously, we were hoping the Resort would sell as much as Washington Federal. Without a sale, the value of the collateral simply implodes. You can see that result was in the actual values provided by Mr. Koon. No one was misled. We always kept Washington Federal (and South Valley before that) always apprised and fully-informed.

January 28, 2014

Page 4

Third, there was some suggestion in your January 10 letter that Mr. Hulsey had been derelict in the payment of HOA obligations. This too is inaccurate. Mr. Hulsey, at his cost and expense, ultimately reached a resolution of the HOA disputes which remains confidential. However, the issues for HOA dues have been resolved in a manner beneficial to Mr. Hulsey. The lien recorded by the HOA has been rendered moot.

Based on that information, we are reaching out to propose the following resolution. It is a resolution reflective of the actual realities. We hope that upon reflection you will concur. If you have a different valuation data set, or appraisal, please let us know. We don't think Mr. Koon has missed the mark.

Given these factors, we propose as follows:

- (1) Mr. Hulsey will endeavor to obtain take-out financing, and to close the same, within ninety (90) days.
- (2) During the ninety (90) day period, Mr. Hulsey will pay the monthly interest that has accrued under the Note on a current basis.
- (3) Mr. Hulsey will obtain financing to purchase Washington Federal's Note and security in the amount of \$580,000.
- (4) Closing on the terms set forth above will resolve all disputes between the parties.

I hope that you can appreciate that Mr. Hulsey will have to find funds that will only be loaned at a premium. This won't be a great investment for Mr. Hulsey but it will give him one opportunity to try and salvage some future value, which is important now that he is of a retirement age. Frankly, he would likely be better off, in the long term, by allowing the foreclosure to go through, and by filing bankruptcy. But that won't be in your best interest and Mr. Hulsey doesn't feel that such an approach is what he wants to do if he can avoid it.

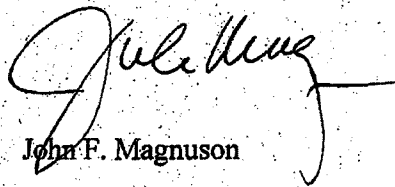
Please look this over and let me know how you wish to proceed. We appreciate the opportunity to discuss this in a rational and reasoned manner. Again, this isn't the fault of

January 28, 2014

Page 5

Washington Federal and it isn't the fault of Mr. Hulsey. If you haven't been to Kellogg lately, you should take a look if you don't believe what I am telling you.

Sincerely,

A handwritten signature in dark ink, appearing to read "John F. Magnuson", with a long horizontal flourish extending to the right.

John F. Magnuson

JFM/js

Encl.

cc: Client  
COPPLE.LTR.wpd



**COMMERCIAL**

**CENTURY 21® Beutler & Associates**

1836 Northwest Boulevard  
Coeur d'Alene, ID 83814

January 9, 2014

Michael Hulsey  
Hulsey Development Company  
PO Box 8600  
62200 Deertrail Road  
Bend, OR 97701

Dear Mike:

Based on the attached Silver Mountain Lease Recap dated 1/9/2014, and our conversation relating to Income and Expenses for the commercial condos you own at Silver Mountain, Kellogg, Idaho, it is my opinion that the current value of your condos on an Income Analysis is in the area of \$550,000 to \$575,000 or \$57.00 per square foot for the approximate 9,800 square feet of space you own.

**Actual Annual Income: \$125,856**

**Expenses:**

Taxes 2013: (\$15,331)  
Insurance 2013: (\$9,120)  
CAM Expenses (30%): (\$37,756)  
**Total Expenses: (\$62,707)**

**Actual Net Income: \$63,649**

**Cap Rate: 11%**

**Current Market Value: \$578,627**

The information above has been provided by the owner of the property. This analysis has not been performed in accordance with Uniform Standards of Professional Appraisal practice which requires valuers to act as unbiased, disinterested third parties with impartiality, objectivity and independence and without accommodation of personal interest. It is not to be construed as an appraisal and may not be used as such for any purpose.

Sincerely,  
Century 21 Beutler & Associates

  
Jim Koon  
Associate Broker  
(208) 292-5700

**Silver Mountain Lease Recap**

**January 9, 2014**

1-lobby 1,587 sq ft	\$4,489 month
2-business office 119 sq ft	\$84 month
3-bike storage 246 a sq ft	\$297 month
4-ski retail \$0.87 1,755 sq ft-this lease was readjusted by Silver Mt Corp under the threat of relocating	\$2,003 month
5- office \$500 month 588 sq ft	\$500 month
6a&b-housekeeping units 312 sq ft @ \$0.71 a sq ft	\$221 month
7a-Wildcat Pizza 1,312 sq ft @ \$1.32 a sq ft	\$1,740 month
7b-Mountain Cafe 1,076 sq ft @ \$1.50 a sq ft	\$1,614 month
7c-Spa/Salon 1,312 sq ft	Vacant

**TOTAL RENT \$10,448 Monthly**

The problems are Unit 7b, Mountain Cafe struggles every month. All tenants other than Jeld Wen are now on month to month. Even though the leases are (were) triple net with tenant paying HOA fees and property taxes they cannot afford to pay. The Spa/Salon has been vacant for 4 months and they were approximately 6 months behind in rent. My choice is to force the tenants to pay all cost and loose them as tenants or attempt to keep their units open and occupied.

Silver Mountain has become a part time ski area and water park resort with poor customer service and a poor repartition within the local community. Large groups boycott the resort and the condo owners are in an uproar regarding management issues and high HOA fees.

**FILED**  
STATE OF IDAHO  
COUNTY OF SHOSHONE / SS

OCT 07 2015

TIME: \_\_\_\_\_ AM/PM  
*John F. Magnuson*  
DEPUTY CLERK

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; SILVER  
MOUNTAIN CORPORATION, an Oregon  
corporation; MORNING STAR LODGE  
OWNERS ASSOCIATION, an Idaho non-  
profit association; JOHN and JANE DOES  
I-X; and WHITE CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**POST-TRIAL OPENING BRIEF OF  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC**

COME NOW Defendants Michael R. Hulsey, individually, and SM Commercial Properties, LLC, an Idaho limited liability company, by and through their attorney of record, John F. Magnuson, and respectfully submit this Post-Trial Opening Brief, pursuant to the Court's directives at the conclusion of the a bench trial held September 22, 2015.

**POST-TRIAL OPENING BRIEF OF DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC - PAGE 1**

1400

## I. INTRODUCTION.

Michael R. Hulsey ("Hulsey") purchased nine (9) commercial condominium units (collectively referred to herein as "the subject property") at the base of Silver Mountain. Hulsey testified that he acquired the units from the project developer and resort operator, Jeld-Wen, Inc. ("Jeld-Wen"). The purchase price of \$2,340,000 was financed in part by a loan from South Valley Bank & Trust of Bend, Oregon. See Ex. A.

South Valley Bank loaned Hulsey \$1,350,000 towards the purchase price. Id. Hulsey personally paid the difference. See Tr. Test. of Hulsey. The loan was secured by a Deed of Trust (Ex. C) and an Assignment of Rents (Ex. D). See also Ex. 5 at Ex. E.

Plaintiff Washington Federal is the successor-in-interest to South Valley's rights under the loan and the companion security agreements executed by Hulsey. Within one month after succeeding to South Valley Bank's interest in the loan documents, the loan matured, Washington Federal declined to extend the same, and Washington Federal declared default.

Washington Federal ultimately filed this proceeding, seeking the appointment of a receiver under the terms of its Deed of Trust and Assignment of Rents. Washington Federal also sought to judicially foreclose the rights to which it had succeeded under the Deed of Trust, as a mortgage, with the Court reserving jurisdiction to determine the amount, if any, of any resulting deficiency judgment.

The subject property was sold on March 5, 2015 by the Shoshone County Sheriff in accordance with the terms of the Court's Judgment. On September 22, 2015, the parties appeared before the Court to try the following issues: (1) whether Washington Federal could prove the existence of a deficiency on March 5, 2015 based upon its credit bid of \$765,000; and (2) if

Washington Federal could prove, by a preponderance of the evidence, the existence of a deficiency, then what was the amount of said "deficiency" for purposes of entry of judgment as against the Defendants?

## **II. THE ISSUE AT TRIAL.**

On August 18, 2014, the Court entered its "Judgment and Decree of Foreclosure (Order of Sale)." The Judgment provides as follows:

- (9) That the Court specifically retains jurisdiction to determine the sole remaining issue after Sheriff's Sale of the fair market value of the foregoing property as of the date of the foreclosure sale for the purpose of determine whether Plaintiff is entitled to entry of deficiency judgment against Defendant Michael R. Hulsey.

See Judgment (entered August 18, 2014) (Ex. 1) at p. 4, ¶9.

Idaho Code §6-108 provides in pertinent part:

No Court in the State of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the Decree, plus costs of foreclosure and sale, and the reasonable value of the mortgage property, to be determined by the Court in the Decree upon the taking of evidence of such value.

If the fair market value of the mortgaged property is greater than the amount expended by a purchaser at the foreclosure sale (as is urged by Defendants here), then the fair market value will be used to compute the amount of the deficiency. Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

The Court's August 18, 2014 Judgment fixed the amount due under the subject loan at \$1,487,517.62. See Ex. 39. Washington Federal claims that the amount due and owing as of March 5, 2015, based upon the foregoing principal amount plus interim interest from August 18, 2014



through March 5, 2015, was \$1,529,080.76.

Based upon its credit bid of \$765,000, Washington Federal claims a deficiency of \$764,080.76, all as calculated in Ex. 39. Defendants dispute both the existence of a deficiency, as of March 5, 2015, and Plaintiff's proof of the amount of the same at trial. Defendants claim that the fair market value of the subject property, as of the foreclosure sale, was no less than \$1,500,000 and, coupled with credit for net rents collected by the Receiver (\$9,474.54), there is no deficiency upon which judgment can be entered.

### **III. THE EVIDENCE AT TRIAL.**

#### **A. The Subject Property.**

The subject property consists of nine (9) separate legal condominiumized commercial units.

See Ex. 22 at p. 3. Those units are described as follows:

- Commercial Unit No. 1;
- Commercial Unit No. 2;
- Commercial Unit No. 3;
- Commercial Unit No. 4;
- Commercial Unit No. 5;
- Commercial Unit No. 6;
- Commercial Unit No. 7A;
- Commercial Unit No. 7B;
- Commercial Unit No. 7C.

Id. The subject units were constructed in 2005 by Jeld-Wen, the original project developer and the current owner and operator of the Silver Mountain Resort. Id. at p. 1; Tr. Test. of Hulsey.<sup>1</sup>

Jeld-Wen constructed the commercial condominiums and then leased several units back to

---

<sup>1</sup> Jeld-Wen is a multi-national corporation and one of the largest private employers in the State of Oregon. See Tr. Test. of Hulsey. Jeld-Wen in turn owns Silver Mountain Corporation, the entity which currently owns and operates the Silver Mountain Resort.

itself. See Tr. Test. of Hulsey. As of the date of the foreclosure sale (March 5, 2015), Jeld-Wen (Silver Mountain) still leased Units 1-4 and 6. See Ex. 22 at p. 20.<sup>2</sup>

Having constructed the subject property, and having entered into leases for a majority of the spaces, Jeld-Wen sought to sell the property to a third-party subject to the leases. As acknowledged by Ms. Mundlin, Jeld-Wen (through "Silver Mountain") was an ideal tenant, with a large capitalization and financial stability. Further, the Jeld-Wen leaseholds were (and remain) "critical" components of the Silver Mountain operations. See Ex. 22 at p. 35; Tr. Test. of Mundlin. Mundlin further conceded that it was highly "unlikely" that Jeld-Wen would not honor its Silver Mountain leases given the unlikelihood that the resort would close. See Ex. 22 at p. 35; Tr. Test. of Mundlin.

When Jeld-Wen went looking for a buyer, it found one in Mr. Hulsey. Mr. Hulsey ultimately purchased the subject property, succeeding to the Lessor's rights under the subject Jeld-Wen/Silver Mountain leases, for a price that exceeded \$2.3 million. See Tr. Test. of Hulsey. Hulsey personally invested approximately \$1,000,000, and financed the remainder with a \$1,350,000 Promissory Note (executed August 30, 2005) for the benefit of South Valley Bank. See Ex. 5 at Ex. E. In 2009, Hulsey conveyed the property to co-Defendant SM Commercial Properties, LLC, a limited liability company wholly owned and managed by Hulsey. See Ex. 30; Tr. Test. of Hulsey.

Between the date the Note was signed (August 30, 2005) and the date the loan matured (September 5, 2012), Hulsey made each and every payment required of him in a timely manner. See

---

<sup>2</sup> The subject leases are identified as "Silver Mountain Corporation" and "Silver Mountain Outdoors" leases at p. 22 of the Mundlin Appraisal (Ex. 22). A summary of the leaseholds within the subject property, their respective sizes (in terms of square footage), and the names of the tenants, as of the foreclosure date, are included in the Mundlin Appraisal (Ex. 22) at p. 20. That page is reproduced as Exhibit A to this Memorandum for the Court's convenience.

Ex. 5 (Ex. E); Tr. Test. of Hulsey. See also Tr. Test. of Cuzner. In September of 2012, shortly before Hulsey's note matured, Washington Federal succeeded to the interest of South Valley Bank in and to the Promissory Note, Deed of Trust, and Assignment of Rents. See Tr. Test. of Cuzner and Hulsey. After the loan matured, with a then outstanding principal balance of approximately \$1,217,410, Hulsey continued to make interest payments on a voluntary basis. Id.

Hulsey also brought all property taxes assessed against those units not leased by Silver Mountain (which was already obligated under the terms of its leases to pay the property taxes assessed against its leasehold premises). Between May of 2011 and May of 2013, Hulsey paid in excess of \$73,000 in property taxes on the portions of the subject property not leased to Silver Mountain. See Exs. K and L. Hulsey did so based upon his opinion and belief that the value of the subject property, at that time and as of March 5, 2015, was in excess of \$1.5 million.

On August 13, 2013, Hulsey received an offer to purchase the subject property for Two Million Dollars (\$2,000,000). See Ex. U. The offer was submitted by a purchaser who was then attempting to assemble properties that would include both the Silver Mountain Resort and the subject properties (which Mundlin acknowledged were "critical" to the Resort's operations). See Tr. Test. of Hulsey; Ex. 22 at p. 35.<sup>3</sup>

Hulsey provided Washington Federal with a copy of the offer (Ex. U). See Tr. Test. of Hulsey. Washington Federal responded by directing Hulsey to refer all future communication to its counsel, Terry Coppel. See Ex. P.

---

<sup>3</sup> This offer also proposed to acquire Commercial Unit No. 8, which was not owned by Hulsey and which was free and clear of any claim of South Valley Bank or Washington Federal as its successor. The offer is an example of the appraisal concept known as "assemblage," which is discussed more fully herein in the context of Ms. Mundlin's testimony.

Consistent with Washington Federal's request, Mr. Hulsey, through counsel, sent a settlement letter to Mr. Coppel on January 28, 2014. See Ex. JJ. The settlement letter proposed to purchase Washington Federal's note and security for \$580,000 based upon an informal "opinion" of value offered by Jim Koon, the property manager and Associate Broker. Id. Under any and all circumstances, the information provided to Mr. Coppel, as the designated representative of Washington Federal, was in the context of settlement.

Armed with Mr. Hulsey's settlement offer, Washington Federal proceeded as follows:

- (1) Three days later, it initiated this proceeding, seeking the appointment of a receiver and the foreclosure of its Deed of Trust as a mortgage; and
- (2) Washington Federal moved for summary judgment, attaching as Exhibit E to the Affidavit of Roy Cuzner (filed February 25, 2014), Hulsey's settlement offer.

On March 10, 2014, Hulsey and SM Commercial Properties filed a formal objection to Washington Federal's attempt to introduce the Hulsey settlement letter as evidence given the strictures of IRE 408. The District Court did not rule on the objection given the parties' subsequent stipulation to the appointment of a receiver.

Having improperly attempted to introduce a settlement document for purpose of prejudicing the trier of fact, Washington Federal then took excerpts of the very same settlement document and provided them to Appraiser Mundlin for inclusion as an exhibit in her appraisal. See Ex. 22 at pp. 63-64. On cross-examination, Mundlin acknowledged that she did not receive, as part of the documentation, the accompanying settlement letter from Mr. Hulsey's counsel to Mr. Coppel and Washington Federal. Further, she offered no explanation as to why she included the excerpts from the settlement document in the appendix to her Appraisal without any discussion of the same in the

substantive portion of said Appraisal. See Tr. Test. of Mundlin.

**B. Subsequent Court Proceedings.**

On March 17, 2014, upon the parties' stipulation, the Court entered its "Order Appointing Receiver." The Court's Order appointed David Renning and Welles Renning Advisory Services to act as Receiver pending further litigation.

The Receiver then accomplished several things, with Court approval. The Receiver hired Jim Koon to manage the subject property during the term of the Receivership. Mr. Koon charged the Receiver \$850 per month to manage the subject property. See Ex. 26, ¶9. Mr. Koon's commercial property management experience includes over 600,000 square feet of commercial space in North Idaho and Eastern Washington, including the Coeur d'Alene Federal Courthouse and the Hecla Mining Offices, as well as leaseholds rented by the City of Coeur d'Alene and the State of Idaho. Id. The Receiver also obtained entry of an order permitting the extension of leases on two (2) of the five Silver Mountain leaseholds on the subject property. See Exs. 36 and 37. The lease extensions included an extension of Silver Mountain's lease for Unit 2 through September 2017, with two (2) additional lease extension options, each for three (3) more years. See Ex. 38. Under the lease extension for Unit 3, Silver Mountain's lease was extended for a similar term. Id. In requesting the extensions, the Receiver, under oath, acknowledged as follows:

On or about April 29, 2014, Jeffrey Woolworth from Jeld-Wen Real Estate advised me about Silver Mountain's interest in extending the leases for Units 2 and 3. Through Jeld-Wen, Silver Mountain expressed interest in not just the tenant extension provided for in Third Amendments, but also requested Fourth Amendments to the 2005 original leases to include two (2) additional options to extend for three (3) periods. Silver Mountain is a prime tenant. The lease rate for the extensions are at or above market rate, and the parties have a pattern and practice of including Tenant options to extend in their almost ten (10) year history of dealings....

See Ex. 37.

In her Appraisal (Ex. 22), Ms. Mundlin included a Synopsis of Leases in effect (with an identification of the applicable extension periods) as of March 5, 2015. See Ex. 22 at p. 29. A copy of the Lease Synopsis is attached to this Memorandum as Exhibit D for the Court's convenience. As can be seen from the Lease Synopsis, the five (5) Silver Mountain leaseholds have renewal options extending to 2018 (in the case of Unit 4 (the retail shop)) to 2025 (in the case of Unit 1 (the critical resort lobby and ticket office)). Id.

With respect to the units still under lease to Silver Mountain, as summarized on Exs. A and B hereto (excerpts from the Mundlin Appraisal), those leaseholds have remained under lease to Silver Mountain (characterized by Washington Federal's Court-appointed Receiver as "a prime tenant") since the inception of the project. The vacancy rate for the Silver Mountain units has been zero percent since day one and is likely to continue unchanged. Mundlin conceded that the foregoing leaseholds were "critical" to the operations of the Resort, and that it was unlikely that Silver Mountain would close the Resort. See Ex. 22 at p. 35; Tr. Test. of Mundlin.

After appointment of the Receiver, and the Receiver's acknowledgment of Silver Mountain's vitality and desirability as a tenant, and after execution of lease extensions for the betterment of the property, the Court entered its Judgment and Decree of Foreclosure. See Ex. 1. The Court's Judgment authorized Washington Federal to foreclose the Deed of Trust, as a mortgage, at a duly-noted Sheriff's Sale. Id. The Court retained jurisdiction to determine if there was a deficiency, and, if so, the amount thereof. Id.

On October 29, 2014, prior to the noticed foreclosure sale, SM Commercial Properties, LLC filed for a Petition for Relief under Chapter 11 of the U.S. Bankruptcy Code. See Ex. 3.

Approximately three weeks later, SM Commercial Properties received another offer to purchase the subject property, this time for the price of \$1,500,000. See Ex. V. Like the predecessor offer (Ex. U), the November 19, 2014 offer was conditioned upon the prospective buyer's simultaneous acquisition of the Silver Mountain Resort. Id.

On November 5, 2014, Washington Federal moved for relief from the automatic stay, requesting the ability to renote the Sheriff's Sale as authorized by this Court's Judgment. See Ex. 5. SM Commercial Properties timely objected to the motion. See Ex. 6.

On December 18, 2014, the Bankruptcy Court, Chief Judge Terry L. Myers presiding, held a hearing on Washington Federal's Motion for Relief from Stay. See Ex. 7. SM Commercial Properties argued that it intended to submit a plan of reorganization, coupled with a request that the Order Appointing Receiver be vacated, allowing SM Commercial Properties to repay the Washington Federal indebtedness, through a confirmed plan, as a result of income generated from rentals at the subject property. Id. SM Commercial Properties argued that the value of the subject property was no less than \$1,500,000, as supported by the November 14, 2014 offer. See Ex. 7.

Washington Federal in turn argued that the value of the subject property was no more than \$780,000. Contrary to Washington Federal's assertions, Chief Judge Myers did not determine the fair market value of the subject property. Rather, Chief Judge Myers determined that even if the property was worth \$1,500,000, and given the amount of Washington Federal's claims, there was no equity remaining in the property so as to form the basis for an effective reorganization. Finding no equity, even at a fair market value of \$1.5 million, the Court granted Washington Federal's motion and entered its "Order Granting Motion for Relief from Automatic Stay." See Ex. A.

After Washington Federal was granted relief from stay, this proceeding was initiated. On

March 5, 2015, the Shoshone County Sheriff sold the subject property at a foreclosure sale. Washington Federal advanced a credit bid of \$765,000. Trial then proceeded before this Court on whether or not a deficiency existed and, if so, the amount thereof.

**C. The Testimony of Vicki Mundlin.**

**1. Summary of Mundlin Opinion.**

Mundlin appraised the subject property no less than four (4) times for Washington Federal. See Tr. Test. of Mundlin. Mundlin's last appraisal, dated April 30, 2015, concluded that the value of the subject property, under the "Leased Fee" methodology, was \$780,000 as of March 5, 2015. To put it kindly, Mundlin's opinion represents a result-oriented exercise in subjectivity, weighted towards satisfying the desires of Washington Federal rather than the requirements of the Appraisal Institute or the Uniform Standards of Professional Appraisal Practice (USPAP).

The Income Capitalization approach, in general, values a given property, from an outside investor's standpoint, "by converting a forecast of future income into a present value." See Ex. 22 at p. 28. This analysis, in general, requires the calculation of "Gross Potential Income," which includes "rental income" and "expense reimbursements" paid by lessees. The "Gross Potential Income" is determined by using existing contract rents (where applicable) and projected market rents (where the leaseholds are vacant). This presents the first potential area of subjectivity, i.e., "Imputed Rental Rates."

Once the "Gross Potential Income" is calculated, we then encounter the second area of subjectivity, the "Vacancy Allowance." The Vacancy Allowance, expressed as a percentage, is deducted from the "Gross Potential Income" in order to arrive at "Effective Gross Income."

Once "Effective Gross Income" is determined, we then encounter the third area of



subjectivity, to wit, the calculation of real estate taxes as a component of expenses. In other words, the higher the real estate taxes, the lower the "Net Operating Income." In considering other expenses, we arrive at the fourth area of subjectivity, the "Management Fee," which constitutes another expense necessary to determine "Net Operating Income."

Once we have calculated "Net Operating Income," we arrive at the fifth area of subjectivity, the "Capitalization Rate." The "Capitalization Rate" is an estimate, by the Appraiser, used to determine how an investor would value the property's future income stream (expressed as the "Net Operating Income") given various factors, including risk, tenant stability, expected continuity of operations, and the like.

As is shown below, at each and every turn in the road, these five (5) categories of "subjectivity" were applied to the subject property in a manner that bears no relationship to readily observable facts and market data, both in general and in particular reference to this specific property. At the end of the day, the only evidence of valuation offered by Washington Federal was through Ms. Mundlin. As will be seen, Ms. Mundlin's testimony, in light of her unsupported subjective determinations, failed to establish that a deficiency even existed, let alone the amount thereof.

## **2. Washington Federal Provides Mundlin With Incomplete Data.**

On cross-examination, Mundlin acknowledged that her Appraisal, as well as the three (3) predecessor variants thereof, failed to even mention the fact that the Defendants had received unsolicited third-parties to offer the subject property for amounts at or in excess of \$1.5 million. See Exs. U and V. Mundlin acknowledged that Rule 1-5 of the USPAP standards requires the following:

When the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business ... analyze all agreements of sale, options, and listings of the subject property current as of the

effective date of the appraisal....

See Tr. Test. of Mundlin.<sup>4</sup> USPAP Rule 1.5 requires that information of agreements of sale, even if not closed, must be discussed and, if the appraiser deems such information irrelevant, the appraiser must acknowledge the existence of the information and cite its lack of relevance. Id. Mundlin wholly failed to disclose, note, discuss, or distinguish the two third-party offers, both at or in excess of \$1.5 million, in violation of the USPAP standards.

When asked why she did not discuss the offers, Mundlin indicated that no one, including Washington Federal or its representatives, had made her aware of the offers until Sunday, September 20, two days before the trial before this Court. Moreover, even then, the information came from Washington Federal's counsel, rather than Washington Federal itself. This intentional omission of information provided to Washington Federal's expert, on a repeated basis through four (4) separate appraisals, undermines the credibility and reliability of said expert's opinion insofar as the same is offered to establish the existence of a deficiency or the amount thereof.

**3. Mundlin's Testimony and Opinion Violates the Appraisal Institute's Standards With Respect to Her Treatment of Property Tax Burdens.**

The subject property has been assessed by Shoshone County at \$1,367,710 for five (5) consecutive years (from 2010 through 2014). See Ex. 22, p. 23. Mundlin conceded that Shoshone County has the highest levy rate in the State of Idaho. See Tr. Test. of Mundlin. The property tax expense, included in Mundlin's Income Capitalization approach, is \$32,022.74 based upon the assessed valuation of \$1,367,709. See Ex. 22 at p. 23.

---

<sup>4</sup> Excerpts of the cited USPAP standards are attached as Ex. D.

For the Court's convenience, attached as Exhibit C is a copy of Mundlin's "Income Approach to Value (Leased Fee)," as set forth at page 36 of her Appraisal (Ex. 22), and as reiterated by Mundlin through her trial testimony. As can be seen from Mundlin's analysis, and as was confirmed by her testimony, the property tax expense deducted from "Effective Gross Income" was \$32,023 (or the amount of taxes based upon a \$1,367,710 assessment). Yet at the same time Mundlin was telling the Court that her opinion of the fair market value of the subject property was \$780,000. In other words, Mundlin believed that a bonafide, independent, third-party would pay only \$780,000 for the property, in its devalued state based upon inflated taxes, and then continue to pay the inflated taxes going forward. This opinion methodology is contrary to the strictures mandated by the Appraisal Institute.

Mundlin, assuming the apparent mantle of an advocate rather than an impartial expert, testified that there was no "foreseeability" or predictability that the Shoshone County Assessor or Board of Equalization would equalize the assessed value consistent with the value to which she opined. Yet, under these circumstances, the Appraisal Institute tells an appraiser what to do, a point made known to Mundlin on cross-examination.

The Appraisal Institute requires the following:

If a property is assessed unfairly, the real estate tax expense may need to be adjusted in the reconstructed operating statement.... In projecting real estate taxes, an appraiser tries to anticipate tax assessment based upon past tax trends, present taxes, the municipality's future expenditures, and the perceptions of market participants. Because the concept of market value presumes a sale, the real estate tax projection should consider the impact of the presumed sale on the anticipated assessed value and taxes.

See Tr. Test. of Mundlin. See also, the "Appraisal of Real Estate," 13<sup>th</sup> Ed., published by the

Appraisal Institute (of which Ms. Mundlin is a member according to her testimony) at pp. 484-85.<sup>5</sup> (Emphasis added).

If Ms. Mundlin's opinion is correct, as she suggests it is, then she is required to adjust the property tax expense as if the assessed valuation was consistent with the valuation to which she opined, to wit, \$780,000. Mundlin's appraised value (\$780,000) is 57% less than the assessed value of \$1,367,709. Reducing the annual tax burden of \$32,022.74 by 43% results in an annual tax burden, for the entirety of the subject property, at \$18,252.54. See Tr. Test. of Mundlin.

In summary, Mundlin's first exercise of subjectivity, in the context of property taxes, not only violated the strictures of the Appraisal Institute, but it effectively increased the expenses included in her "Income Approach to Value (Leased Fee)" by \$13,770. At a capitalization rate of 8.25% (the rate used by Mundlin), she understated the property's fair market value by \$166,909 based solely on her mistreatment of property taxes. The error becomes even more egregious with a capitalization rate of 6% (\$229,500). The applicability of a lower capitalization rate, in the context of the five (5) Silver Mountain leases, is discussed more fully below.

#### **4. Mundlin's Testimony and Opinion Subjectively Inflated Management Fees.**

Mundlin's Appraisal and testimony, with respect to the "Income Approach to Value (Leased Fee)," utilized a management fee of 10% of both potential "Rental Income" and potential "Expense Reimbursements." During the period of the Court-approved Receivership, Washington Federal's designated Receiver (Welles Renning) engaged Jim Koon and Commercial Property Management, LLC of Coeur d'Alene to manage the subject property for the fixed monthly rate of \$850. See Ex.

---

<sup>5</sup> Excerpts of the cited standard are attached as Ex. E.

26; Tr. Test. of Mundlin. Plaintiff made no assertion that Mr. Koon was not qualified to manage the subject property. In fact, during the term of Mr. Koon's management, Silver Mountain's leases for Units 2 and 3 were extended at above-market rates. See Exs. 33, 36, and 37. As Welles Renning acknowledged, "Silver Mountain is a prime tenant" and the lease rates for the extensions "are at or above market rate." See Ex. 37, p. 3.

Mundlin concurred that her subjective opinion should incorporate an assumption of reasonable and prudent management of the subject property from and after March 5, 2015. Nonetheless, with respect to the imputed management fee, Mundlin simply accepted the suggestion of her client's representative (Mr. Renning) that she use a projected management fee of 10% of gross rents and tenant reimbursements.

The subject as of the effective date, was managed by Jim Koon, CPM, and commercial broker from nearby Coeur d'Alene, Idaho, for a flat fee of \$850/month, which equates to about 8.6% of the collected rents. This is higher than the typical 2% to 5% range quoted in Coeur d'Alene, before consideration of the additional travel expense associated with managing a property in Kellogg, Idaho. Mr. Dave Renning, the Receiver, indicated that he expected something close to 10% as being reasonable for this fee when associated with the resort location, travel time, etc....

See Ex. 22, p. 34.

In a nutshell, Mundlin acknowledged Koon's \$850 per month management fee as acceptable; stated that Koon's management fee equated to about 8.6% of the collected rents (excluding tenant reimbursables); stated that Koon's management fee was higher than typical; and then proceeded to accept her client's recommendation that she use a higher 10% management fee of both rent and tenant reimbursables. There is no rational basis to Mundlin's methodology. The only explanation could be, consistent with her mistreatment of property taxes, that Mundlin assumed the mantle of an advocate for the interests of her client.

Further, Mundlin conceded, on cross-examination, that Mr. Koon was qualified to management the property and that his \$850 per month management fee was reasonable. By incorporating a higher management fee into her market capitalization approach, Mundlin reduced projected net operating income which in turn, following application of the capitalization rate, produced a lower fair market value. In fact, Mundlin's approach, utilizing a higher than market management fee that also included a percentage of reimbursed property taxes, while at the same time inflating those property taxes, had a synergistic effect so as to cause a more marked reduction in the resulting opinion of value.

**5. Mundlin's Testimony and Opinion Inflated Subjectively Estimated Vacancy Rates for the Subject Property With No Rational Basis.**

Mundlin utilized an across-the-board vacancy rate of 22%. See Ex. 22, p. 36. See also Ex.

C hereto. Mundlin's utilization of a 22% vacancy rate ignores the following facts:

- (1) Each of the subject commercial units is a separate legal parcel, capable of being sold individually.
- (2) The five (5) Silver Mountain leaseholds (Units 1 through 4 and 6) have never been vacant.
- (3) Silver Mountain is a "prime" tenant, and its usage of the subject leasehold is "critical" to the operations of the Resort.
- (4) Silver Mountain is not likely to close its operations, so as to create vacancies in the subject units.

When asked what vacancy rate she would impute to an "Income Approach to Value (Leased Fee)" solely as to Units 1, 2, 3, 4, or 6, which had never been vacant, Mundlin had no answer. Mundlin conceded that a reasonable investor, seeking to purchase the properties at market value as of the foreclosure sale date, could reasonably conclude that the vacancy rate applicable to Units 1-4 and

6 was 5%, 2%, or even 0%. See Tr. Test. of Mundlin.

Mundlin further conceded that her utilization of a 22% vacancy rate was an inherently subjective exercise and could well be incorrect. The facts set forth above demonstrate the inaccuracy of Mundlin's vacancy rate as applied to Units 1-4 and 6. The extent of Mundlin's analysis consisted of dividing the City of Kellogg in half, separated by Interstate 90, and concluding that vacancies on the north side (where Dave Smith Motors dominates the area) were 20% and those in uptown Kellogg reached 50% to 60%. See Ex. 22, pp. 11-13. When confronted with a readily demonstrable historic vacancy rate of 0% for Units 1-4 and 6, Mundlin's only response was to claim that the vacancy rate for the remaining units (Units 5, 7A, 7B, and 7C) would then need to be raised to 40%, even though Units 7A and 7B are currently occupied and have consistently been occupied for the past 10 years. See Tr. Test. of Mundlin and Hulsey.<sup>6</sup>

Mundlin's treatment of vacancies is equally problematic in that her methodology failed to comply with the Appraisal Institute's Standards. The Appraisal Institute Standards provide as follows:

To perform a cash flow analysis when a below-market rent is specified, cash flows are projected through to the point at which contract rent converts to market rent and the property achieves a stabilized position in the market...

A copy of the Appraisal Institute Standard is attached hereto as Exhibit F. At the time her opinion was rendered, Units 5 and 7C were vacant. As can be seen from p. 36 of her Appraisal (Ex. 22), also attached hereto as Ex. C, Mundlin properly imputed market rent for Units 5 and 7C in her analysis.

---

<sup>6</sup> Interestingly, if the units are viewed as separate legal parcels, each separately saleable, and if a 5% vacancy rate is used for Units 1-4 and 6, together with a 40% vacancy rate for Units 5, 7A, 7B, and 7C, the fair market value increases dramatically. These results are discussed more fully in Section IV, infra.

As for Units 7B (Wildcat Pizza) and 7C (Mountain Café), Mundlin utilized contract rents. Yet Mundlin acknowledged, both in her Appraisal and in her testimony, that Wildcat Pizza and Mountain Café were both on month-to-month leases, each terminable on 30 days notice. Under this scenario, Mundlin not only erred in her across the board application of a 22% vacancy rate, she compounded the error by using contract rents for Units 7B and 7C when the Appraisal Institute (given the terminable nature of the leases) mandated the use of market rents.

**6. Mundlin Artificially Decreased the Fair Market Value of the Subject Property Through Her Utilization of an Across-the-Board Capitalization Rate of 8.25%.**

Mundlin's "Income Approach to Value (Leased Fee)," attached hereto as Ex. C (Ex. 22, p. 36), utilized an across-the-board capitalization rate of 8.25%. This subjective exercise resulted in an artificial decrease in her resulting opinion of fair market value.

Mundlin analyzed market capitalization rates in North Idaho, which ranged from 6.10% for a Napa Auto Center lease in Post Falls to 8.75% for an office building on Anton Avenue in Coeur d'Alene. See Ex. 22, p. 34. Mundlin testified that the lower capitalization rate used to value the Napa lease was because of Napa's national presence, market capitalization, stability, and low risk to vacate.

On cross-examination, Mundlin acknowledged that she was unaware that Napa had a lower market capitalization than Jeld-Wen's parent company. Further, Silver Mountain (Jeld-Wen) was characterized by the Receiver as a "prime tenant," who paid "above market rents." Mundlin herself acknowledged that it was unlikely that Jeld-Wen would close the resort "given [its] substantial investment," and the fact that the Silver Mountain leaseholds were "critical to the ski resort operation." Id. at p. 35. Mundlin concluded that, "[I]t is highly unlikely they (the Silver Mountain



leaseholds) will go vacant.” Id.

The foregoing facts, coupled with Mr. Hulsey’s testimony, given his 30 years of experience in commercial property development, management, and operation, as well as coupled with his experience with the subject property over the past 10 years, suggests that a capitalization rate of 6.1% is more appropriate for the Silver Mountain leaseholds (Units 1-4 and 6), with the capitalization rate of 8.25% being applicable only to the remaining units (Units 5, 7A, 7B, and 7C). Mundlin’s use of an overly broad and excessive capitalization rate, when dealing with separate and unique parcels of condominiumized property, markedly depressed her resulting opinion of value.

**7. Mundlin Acknowledged the Validity of the Concept of “Assemblage.”**

On cross-examination, Mundlin acknowledged the appraisal concept of “assemblage.” She concurred that under certain circumstances, a given parcel of real estate, valued on an income capitalization approach, might have a higher market value if there were unique attributes to the property that made it more valuable to an adjacent or adjoining property owner who had an intended use that added a “premium” to value.

Mundlin was presented with the example of the craftsman-style home surrounded by the Sacred Heart Medical Center in Spokane. Mundlin concurred that the identified residence would have one fair market value if used as a residence. However, the identified residential property would have a higher value to the owners and operators of the hospital complex because they would not intend to put the residence to a residential use. Rather, they would foreseeably amalgamate the residence into their existing hospital operations for purposes of expansion. Simply put, the residence is worth more to the adjacent and adjoining property owner (the hospital) than it is to a third-party intending to buy the property for use as a residence.

The two offers received by Defendants prior to foreclosure (Exs. U and V) placed a value on the subject property of \$1.5 million or more. Both offers were conditioned upon the purchaser's ability to simultaneously close the acquisition of the surrounding resort itself. To a large degree, if the value of the subject property is determined on an income capitalization approach, and if that value is less than \$1.5 million, it is really of no moment. The increment of value between the fair market value of the subject property (determined under the Income Capitalization approach) and the \$1.5 million offer constitutes the "assemblage" value of the subject property. Mundlin did not disagree.

That "assemblage" value will be acquired by whoever purchases the subject property if they do not simultaneously close the purchase of the resort. In other words, the "assemblage" component of value will always be part of the subject property, given its "critical" relationship to resort operations and the unlikelihood that the resort will close. He who buys the subject property has the ability to sell the same to the next purchaser of the resort, and that will happen, whether today, tomorrow, this year, or next year.<sup>7</sup>

#### **D. Testimony of Roy Cuzner.**

For purposes of resolving the issue at bar (to wit, the fair market value of the subject property on March 5, 2015), Mr. Cuzner, on behalf of Washington Federal, offered no opinion testimony. Mr. Cuzner simply established the amount owed Washington Federal as of March 5, 2015 and nothing more. Cuzner and Washington Federal deferred to Mundlin for all appraisal evidence.

---

<sup>7</sup> Mr. Hulsey offered un rebutted testimony in Defendants' case that he is aware of continued expressions of third-party interest in the subject property, at a value of \$1.5 million or more, provided the purchaser can simultaneously close on the purchase of the resort, which remains listed for sale.

#### **E. Testimony of Mike Hulsey.**

Mike Hulsey offered testimony in Defendant's defense that established his personal and professional experience in commercial property operation, management, development, and leasing. Mr. Hulsey testified that he had approximately 30 years of first-hand personal knowledge and experience in operating, managing, and developing commercial properties, starting first with a resort in Oregon and then expanding into other states, both individually and in tandem with others. Mr. Hulsey was fully conversant with the concepts of vacancy rates, capitalization rates, lease rates, management fees, and the like. Mr. Hulsey also owned and managed the subject property for a period of nearly ten years.

Mr. Hulsey offered credible opinion testimony that the values of Mundlin ascribed to several subjective variables, utilized in her Income Capitalization methodology, were suspect, incorrect, and inaccurate. As for vacancy rates, Hulsey testified that the units occupied by Silver Mountain (Units 1 through 4 and 6) had never been vacant since the day they were built. Mr. Hulsey also echoed Ms. Mundlin's observation that said units were critical to the Resort operations and unlikely to close.

With respect to capitalization rates, Mr. Hulsey offered testimony of the stability and financial strength of Jeld-Wen, and, based upon his experience, the accuracy of a 6.1% capitalization rate as to those units (consistent with the Napa lease identified by Ms. Mundlin). Mr. Hulsey also conceded that an 8.25% capitalization rate was reasonable and appropriate for the remaining four units.

Mr. Hulsey further offered his opinion, admissible as the owner of the property, that the fair market value of the same was no less than \$1.5 million as of the date of the foreclosure sale. Mr. Hulsey adequately identified the bases for his opinion, including Mundlin's erroneous use of an

excessive capitalization rate as to the Silver Mountain units, Mundlin's use of an excessively high vacancy rate for the Silver Mountain units, and Mundlin's use of overstated management fees and tax expenses. Hulsey further relied upon the two (2) independent offers he had received for third-parties (Exs. U and V), proposing to pay not less than \$1.5 million for the subject property (conditioned only upon the purchaser's simultaneous acquisition of the Resort, which was and remains listed for sale). Hulsey further testified that interest remains high in the subject property on the part of individuals still seeking to assemble the properties.

The only "issues" raised with Mr. Hulsey's testimony, by Washington Federal on cross-examination, was in the context of Washington Federal's continued reliance upon the settlement letter that Mr. Hulsey sent to Washington Federal (through Washington Federal's instruction). That letter was identified by Hulsey as having been offered in settlement in an attempt to start negotiations. Obviously, the negotiations were unsuccessful, as Washington Federal filed suit three days later. Hulsey did not concede or acknowledge that the values suggested in the context of settlement represented the fair market value of the subject property. For negotiation purposes, Hulsey was proposing values to attempt to initiate a dialogue. Hulsey conclusively and unequivocally testified, both on direct and cross-examination, that his opinion of the fair market value of the subject property as of the foreclosure sale date was not less than \$1.5 million.

#### **IV. ARGUMENT.**

##### **A. Washington Federal's Burden of Proof.**

Washington Federal bore the burden of proof, by a preponderance of the evidence, that there was a deficiency on March 5, 2015. Washington Federal offered testimony (through Roy Cuzner), that the total balance due and owing under the Hulsey obligation, as of March 5, 2015, was

\$1,529,080.76. Washington Federal made a credit bid of \$765,000. However, based upon Ms. Mundlin's income capitalization methodology, she opined that the fair market value of the subject property as of the date of the foreclosure sale was \$780,000. Moreover, Washington Federal acknowledges that Hulsey was entitled to credit for \$9,474.54 in rents remaining after the Receiver paid both himself, Jim Koon, and Washington Federal's counsel. See Ex. 39.

If the fair market value of the subject property, as of March 5, 2015, was \$1,519,606.22 (the balance owed less the rental credit), then there was no deficiency. Washington Federal failed in its effort to prove both the existence of the deficiency and the amount thereof. The Court will recall that the only evidence of fair market value offered by Washington Federal at trial was in the form of Ms. Mundlin's testimony.

**B. Ms. Mundlin Failed to Substantiate or Prove the Existence of a Deficiency by a Preponderance of the Evidence.**

**1. Alternative Fair Market Value No. 1 (Exhibit DD) Utilizing Corrected Assumptions.**

Attached hereto for the Court's convenience, as Exhibit G, is a copy of Ex. DD as admitted at trial. Mundlin concurred that the methodology employed in Ex. DD mirrored the methodology she had employed in her "Income Approach to Value (Leased Fee)" at p. 36 of her Appraisal (Ex. 22). See also Ex. C hereto. The only differentiations between the methodology shown in Ex. DD and the methodology employed by Ms. Mundlin is as follows:

- The real estate taxes have been reduced by \$13,770 (consistent with the strictures of the Appraisal Institute).
- The management fee has been reduced from 10% of "Gross Potential Rental Income" and "Total Expense Reimbursement" to \$850 per month (the amount the Receiver paid Jim Koon).

- The vacancy rate for the five (5) Silver Mountain tenancies has been reduced from 22% to 5%.
- The vacancy rate for the remaining four (4) units remains at Mundlin's stated rate of 22%.
- The same rents used by Mundlin were used in the methodology shown as Ex. DD.
- The same cap rate used by Mundlin (8.25%) was applied to both the Silver Mountain income and the income for the remaining four units.

The Court will note that this methodology still incorporates the unsupported assumption that the 8.25% capitalization rate will apply to both the Silver Mountain leases and the remaining four leases. Further, the methodology in Ex. DD incorporates the unsupported assumption of Ms. Mundlin that the rents for Units 7A (Wildcat Pizza) and 7B (Mountain Café) will be contract rather than market rents even though both leaseholds are terminable on 30 days notice.

The resulting fair market value is \$1,187,842. Ms. Mundlin concurred that this would be the resulting fair market value incorporating the assumptions described above. The assumption regarding the reduction in property taxes is reasonable in that is an assumption consistent with the methodology required by the Appraisal Institute. The reduction in the management fee is consistent with actual practice and the weight of the evidence, as corroborated by Mr. Hulsey's testimony. The 5% vacancy rate imputed to the Silver Mountain leaseholds was conceded by Mundlin to be reasonable in the eyes of a potential investor given the history of those five units and their "critical" relationship to Resort operations.

The foregoing variant of fair market value, although higher than Mundlin's opined value, is still incorrect and "low" in that it erroneously includes contract rather than market rent for Units 7A

and 7B and includes an above market capitalization rate for the Silver Mountain units. Nonetheless, the difference between the debt owed as of March 5, 2015 and the fair market value as suggested by Ex. DD (\$1,187,842) is not a "deficiency" as the same is to be valued under the assemblage methodology. Put another way, if the debt owed on March 5, 2015 was \$1.5 million, and if the fair market value of the subject property as of said date was \$1,187,842 (Ex. DD), then the assemblage value, based upon the independent third-party offers, was \$312,158. Mundlin was not told of the independent third-party offers until after she had completed four (4) appraisals of the subject property for Washington Federal.

## **2. Alternative Fair Market Value No. 2 (Ex. DD).**

Attached hereto as Exhibit H is a copy of Ex. EE. This alternative methodology employs the following assumptions:

- Property taxes (as an expense) have been reduced by \$13,770.
- The Jim Koon management fee of \$850 per month has been utilized.
- A vacancy rate of 0% has been imputed to the Silver Mountain leaseholds (consistent with the prior ten years of practice).
- Mundlin's erroneously imputed actual rents for 7A and 7B have been carried forward.
- An across-the-board capitalization rate of 8.25% has been utilized.
- Mundlin's vacancy rate of 22% has been utilized for the remaining four (4) units.

The calculation of the resulting fair market value (at \$1,240,291) was acknowledged as accurate by Mundlin based upon the foregoing assumptions.

Under this alternative valuation method, which still is erroneously understated based upon the use of actual rather than market rents for Units 7A and 7B, and which uses an inflated capitalization rate for the Silver Mountain units, is approximately \$260,000 less than the amount of the debt owed on March 5, 2015. As set forth above, there is \$260,000 in “assemblage” value, above and beyond the fair market value as expressed in Ex. EE, based upon the evidence of record.

**3. Alternative Fair Market Value No. 3 (Ex. FF).**

Attached hereto as Exhibit I is a third alternative valuation methodology. The assumptions which differ from those utilized by Mundlin are as follows:

- Market (rather than contract) rent has been used for all four (4) non-Silver Mountain units.
- The Silver Mountain vacancy has been estimated at 5% (notwithstanding the fact that history shows a 0% vacancy rate).
- The property taxes have been reduced by \$13,770.
- The Jim Koon management fee of \$850 per month has been used.
- The overly-broad capitalization rate of 8.25% has been applied to all of the units (including the Silver Mountain leaseholds).

The resulting value, which was accurate according to Ms. Mundlin’s testimony, was \$1,349,345.

The differential between said value and the amount of the debt owed as of the foreclosure sale (\$1.5 million) consists of “assemblage,” and Mundlin offered no facts or evidence to the contrary. In fact, she didn’t even know about the third-party offers until two days before trial.

**4. Alternative Fair Market Value No. 4 (Ex. GG).**

The alternative “Income Approach to Value (Leased Fee)” methodology set forth in Ex. GG



is attached hereto for the Court's convenience as Exhibit J. This methodology mirrors that of Ms.

Mundlin (Ex. 22 at p. 36) with the following exceptions:

- Market rather than contract rent has been used for Units 7A and 7B (consistent with USPAP and Appraisal Institute standards).
- The vacancy rate for the Silver Mountain leaseholds (consistent with the prior ten years) is set at 0%.
- The property tax adjustment of \$13,770 has been made.
- The Jim Koon management fee of \$850 per month has been used.
- The across-the-board capitalization rate of 8.25% has been used (notwithstanding Defendant's contention that said rate is excessive when applied to the Silver Mountain leaseholds).

The resulting fair market value, the calculation of which was acknowledged as accurate by Mundlin, is \$1,401,794. As set forth above, the difference between this sum and the amount of the debt owed on March 5, 2015 (\$1.5 million) is encompassed by the additional component of "assemblage" value, and Mundlin offered no evidence to the contrary.

**5. Washington Federal Failed to Prove the Existence of a Deficiency.**

In light of her erroneous assumptions, and her inability to deny the applicability of "assemblage," Mundlin offered no evidence, on a more probable than not basis, to establish that a deficiency existed as of March 5, 2015.

It is clear that Mundlin erred in several respects, including the elements of property taxes, vacancy rates, management fees, and imputed contract rents (rather than market rents). These points will not be belabored here. What is clear is that Mundlin offered an opinion of fair market value that did not comport with the facts and that appeared to be result-oriented. Her opinion of value

(\$780,000) is of no probative weight and, standing alone, is unsupported by a preponderance of the evidence.

Washington Federal offered no further evidence of fair market value other than the testimony of Mundlin. The only fair market value offered by Mundlin was \$780,000, an amount that should be deemed to be unsubstantiated and lacking in credibility and accuracy. As such, the Court, as the finder of fact, could determine that Washington Federal failed to meet its burden of proof of establishing the existence of a deficiency or the amount thereof. Those issues must be proven by Washington Federal, not by the Defendants. Ms. Mundlin, standing alone, failed to carry Washington Federal's burden for the reasons set forth herein. Judgment should be entered in favor of the Defendants, and against Washington Federal, determining that Washington Federal failed to establish the existence of a deficiency on a more probably than not basis.

**C. In the Event the Court Determines That Washington Federal Has Established The Existence of a Deficiency, by a Preponderance of the Evidence, Then the Weight of the Evidence Suggests That the Deficiency is Minimal if Not Zero.**

The evidence at trial suggested that the following "subjective" assumptions of Mundlin were in error:

- Given the month-to-month basis of the leases for Units 7A (Wildcat Pizza) and 7B (Mountain Café), market rents should have been used rather than the contract rents Mundlin used.
- A 5% vacancy rate for the Silver Mountain units was conceded by Mundlin to be commercially reasonable.
- Mundlin took the position that a 5% vacancy rate on the Silver Mountain units would result in an effective vacancy rate for the remaining four units of 40%.
- Mundlin overstated property taxes by \$13,770.

- Mundlin overstated management fees at 10% of gross potential income and expense reimbursement. A reasonable fee was established at \$850 per month.

Attached hereto as Exhibit K is a calculation of Net Operating Income utilizing the foregoing corrections as supported by the evidence. Using the existing Silver Mountain rents, market rents for the remaining four units, a 5% vacancy rate for Silver Mountain's units, and a 40% vacancy rate for the remainder, results in Net Operating Income of \$102,057. See Ex. K.

The total Net Potential Rental Income under this methodology is \$113,094. Again, this incorporates a 40% vacancy rate for the four units other than the Silver Mountain leaseholds as well as a 5% vacancy for the Silver Mountain leaseholds. Of this amount, as is shown on Ex. K, 72.7% of the income was contributed by Silver Mountain and 27.3% was contributed by the remaining four units.

These contribution percentages were then applied to the Net Operating Income of \$102,057. This resulted in Net Operating Income contributed by the five Silver Mountain units of \$74,193. This also resulted in Net Operating Income from the other four units of \$27,864.

The evidence at trial supported the conclusion, as buttressed by both the testimony of Mundlin and Hulsey, as well as the capitalization rate market data for the Napa leasehold, that a 6.1% capitalization rate was reasonable and appropriate for the five Silver Mountain units. The evidence also supported the proposition, both through Mundlin and through Hulsey, that an 8.25% capitalization rate was applicable to the income generated by the other four units. Again, these are nine separate legal units, that can be separately sold. The methodology set forth above and in Ex. K attempts to acknowledge the "good" with respect to the Silver Mountain leases and the "bad" with respect to the other four leases. Applying a 6.1% capitalization rate to the Silver Mountain income

of \$74,193 results in a value of \$1,216,278 solely for the five Silver Mountain units. Applying an 8.25% capitalization rate for the Net Operating Income of \$27,864 generated by the other four units results in an additional fair market value of \$337,745 (attributed only to the other four units).

As set forth below, the total fair market value of the subject property, utilizing the foregoing assumptions, all supported by the evidence, as of March 5, 2015, is as follows:

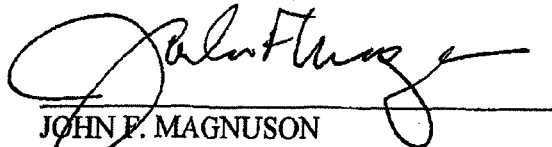
- Silver Mountain income (\$74,193) at 6.1% cap rate: \$1,216,278.
- Other four units' income (\$27,864) at 8.25% cap rate: \$337,745.
- Total fair market value (March 5, 2015): \$1,554,023.

Even if Washington Federal carried its burden of demonstrating that a deficiency existed, then the proof adduced at trial in defense by the Defendants supports a fair market value of \$1,554,023 (with no consideration of "assemblage" value), resulting in a determination that nothing is owed to Silver Mountain.

#### **V. CONCLUSION.**

Based upon the reasons and authorities set forth above, and the evidence admitted at trial, Plaintiff Washington Federal has failed to establish the existence of a deficiency or the amount thereof. Judgment should be entered in favor of Defendants, and against Washington Federal, with Washington Federal taking nothing thereby.

DATED this 7<sup>th</sup> day of October, 2015.

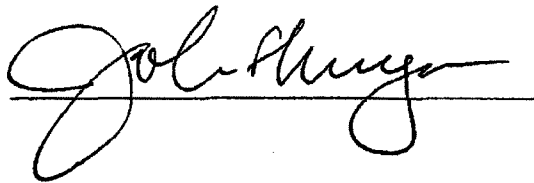
  
JOHN F. MAGNUSON  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of October, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

X U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
X FACSIMILE - 208\386-9428



HULSEY-WA FED.BRIEF POST-TRIAL.wpd

### General Data

Property Type:	Retail
Property Subtype:	Condominium Units
Year Built:	2005
Number of Buildings:	2
Number of Stories:	1
Number of Units:	9

### Building Areas & Ratios

Gross Building Area (GBA):	8,367 sf (based on floor plans)
Gross Rentable or Usable Area (GRA or GUA):	8,367 sf (based on floor plans)
Footprint:	8,367 sf

The following table indicates the breakdown of the building area:

Improvement Detail			
Tenant		Unit Area	Undivided Interest
Bldg A #1	Silver Mountain Corporation - Lobby	1,558 sf	0.00855456
Bldg A #2	Silver Mountain Corporation - Gift Shop	119 sf	0.00065340
Bldg A #3	Silver Mountain Outdoors - Bike Storage	246 sf	0.00135072
Bldg A #4	Silver Mountain Outdoors - Retail Space	1,732 sf	0.00950995
Bldg A #5	Vacant	587 sf	0.00950995
Bldg A #6	Silver Mountain Corporation - Janitorial space	227 sf	0.00124640
Bldg B #7A	Wildcat Pizza	1,393 sf	0.00764589
Bldg B #7B	Mountain Café & Espresso	1,112 sf	0.00610570
Bldg B #7C	Vacant	1,393 sf	0.00764859
<b>Totals</b>		<b>8,367 sf</b>	<b>0.05222517</b>

This rental property is located within the Silver Mountain Resort in Kellogg, Idaho, specifically the Morning Star Lodge Addition. There are two buildings with the Morning Star Retail condos in them. Building A has six rental units. Morning Star Lodge Lobby/Gift Shop/Bike Storage/Janitorial Space lease out several of the parcels and the largest amount of space at 2,150 sf. Morning Star Ski Shop encompasses 1,732 sf. Wildcat Pizza and Mountain Cafe lease two of the three suites in Building B that is owned by SM Properties.

### Exterior

Foundation:	Poured, reinforced concrete foundations and footings
Frame/Walls:	Steel and Concrete
Exterior Wall Finish:	Board and Batt and Synthetic cement siding
Windows:	Aluminum framed, Double pane
Roof System:	PVC single-ply membrane
Roof Cover:	Metal and Membrane

### Interior

Floors:	Carpet, laminate, smooth concrete
Walls:	Painted drywall
Ceiling Finish:	Exposed metal trusses and beams with exposed insulation.

LEASE SYNOPSSES/ABSTRACTS

Tenant	Silver Mountain - Lobby	Silver Mountain - Gift Shop	Silver Mountain - Bike Storage	Silver Mountain - Retail Shop	Silver Mountain - Janitorial	Wildcat Pizza	Mountain Cafe & Espresso
Signature Strength	Local- Resort	Local- Resort	Local- Resort	Local- Resort	Local- Resort	Local	Local
Lease Type	NNN	NNN	NNN	NNN	NNN	Mod Gross	Mod Gross
Tenant Expenses	HOA, RE Taxes, Electricity	HOA, RE Taxes, Electricity	HOA, RE Taxes, Electricity	HOA, RE Taxes, Electricity	HOA, RE Taxes, Electricity	Electricity	Electricity
End of Current Lease Term	9/6/2015	9/6/2017	9/6/2017	9/6/2018	9/6/2015	Month-to- Month	Month-to-Month
Lease Term	9/7/05 - 9/6/15	9/7/05 - 9/6/08	9/7/05 - 9/6/08	9/7/05 - 9/6/10	9/05 - 9/15		
Renewal Options	O1: 9/7/15 - 9/6/20 O2: 9/7/20 - 9/6/25	9/7/08 - 9/6/11 9/7/11 - 9/6/14 9/7/14 - 9/6/17 O1: 9/7/17 - 9/6/20 O2: 9/7/20 - 9/6/23	9/7/08 - 9/6/11 9/7/11 - 9/6/14 9/7/14 - 9/6/17 O1: 9/7/17 - 9/6/20 O2: 9/7/20 - 9/6/23	O1: 9/7/10 - 9/6/13 O2: 9/7/13 - 9/6/18	9/15 - 9/20 9/20 - 9/25		
Physical Area Occupied	1558	119	246	1732	227	1393	1112
Lease Area (Leasable Area)	1558	119	246	1732	227	1393	1112
Base Rent	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA	Monthly Yearly \$/GLA
	\$3,880.00 \$46,560 \$29.88/sf	\$298.48 \$3,582 \$30.10/sf	\$377.07 \$4,525 \$18.39/sf	\$2,185.45 \$26,225 \$15.14/sf	\$280.62 \$3,367 \$14.83/sf	\$1,640.00 \$19,680 \$14.13/sf	\$1,076.00 \$12,912 \$11.61/sf
Current Rent	\$3,996.40 \$47,957 \$30.78/sf	\$300.00 \$3,600 \$30.25/sf	\$375.00 \$4,500 \$18.29/sf	\$2,251.01 \$27,012 \$15.60/sf	\$289.04 \$3,468 \$15.22/sf		
Adj to NNN	\$0.00/sf	\$0.00/sf	\$0.00/sf	\$0.00/sf	\$0.00/sf		
Effective NNN Rate	\$30.78/sf	\$30.25/sf	\$18.29/sf	\$15.60/sf	\$15.22/sf	\$-57.83/sf	\$-57.83/sf
						\$6.30/sf	\$3.78/sf

As discussed previously, the commercial buildings in Kellogg are in the process of being reassessed. A 25% reduction in the assessed value would potentially add \$8,367 to the NOI for both the Fee Simple and Leased Fee analyses. The implied overall capitalization rate increases to 9.3%, which is an attractive rate for an investments of the subject's age and quality, despite the resort town location.

### Income Approach Conclusion – Leased Fee Analysis

Based on the forecast of net operating income and the selected direct capitalization rate, the results of the direct capitalization analysis indicate a Market Value indication of **\$780,000**, developed as shown in the following table.

INCOME APPROACH TO VALUE (Leased Fee)			
Morning Star Lodge "As Is"			
<b>Gross Potential Income</b>			
<b>Rental Income</b>	<b>Area</b>	<b>Rate</b>	<b>Annual Rent</b>
Silver Mountain Corporation	2,150 sf x	\$27.69/sf	\$59,525
Ski Shop	1,732 sf	\$15.60/sf	\$27,012
Suite 5 (NNN)	587 sf	\$8.00/sf	\$4,696
Wildcat Pizza (NNN)	1,393 sf x	\$6.30/sf	\$8,773
Mountain Café & Espresso (NNN)	1,112 sf x	\$3.78/sf	\$4,205
Suite 7c (NNN)	1,393 sf x	\$12.00/sf	\$16,716
<b>Gross Potential Rental Income</b>	<b>8,367 sf</b>	<b>\$14.45/sf</b>	<b>\$120,927</b>
<b>Expense Reimbursements</b>	<b>8,367 sf x</b>	<b>\$7.83/sf</b>	<b>\$65,491</b>
<b>Total Potential Gross Income</b>			<b>\$186,418</b>
<b>Vacancy Allowance</b>	<b>\$186,418 x</b>	<b>22.00%</b>	<b>-\$41,012</b>
<b>Total Effective Gross Income</b>			<b>\$145,406</b>
<b>Operating Expenses</b>			
<b>Reimbursed Expenses</b>			
Real Estate Taxes RD	8,367 sf x	\$3.83/sf	\$32,023
Insurance	8,367 sf x	\$0.21/sf	\$1,757
Utilities (HOA)	8,367 sf x	\$3.69/sf	\$30,874
<b>Maintenance &amp; Repairs</b>	<b>8,367 sf x</b>	<b>\$0.10/sf</b>	<b>\$837</b>
Subtotal	8,367 sf	\$7.83/sf	\$65,491
Management Fee	\$145,406 x	10.0%	\$14,541
			\$0
<b>Replacement Reserves</b>	<b>8,367 sf x</b>	<b>\$0.10/sf</b>	<b>\$837</b>
<b>Total Operating Expenses</b>	<b>8,367 sf x</b>	<b>\$9.67/sf</b>	<b>-\$80,868</b>
<b>Net Operating Income</b>			<b>\$64,538</b>
<b>Capitalization Rate</b>			<b>8.25%</b>
<b>Indicated Value</b>			<b>\$782,279</b>
<b>Rounded to nearest \$5,000</b>			<b>\$780,000</b>

As a test of reasonableness, I have considered the existing income in place based on my analysis of revenues and expenses provided by the Receiver for this analysis. This summary, previously used in the estimate of operating expenses, is presented on the following page with a projected net operating income at 2014 year-end of \$68,591.

This income has little risk and represents the subject's current cash flows. The implied overall capitalization rate is 8.8%, which is well within the range of overall capitalization rates from the sale comparables.



# UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE

## 2014-2015 EDITION

APPRAISAL STANDARDS BOARD



THE APPRAISAL FOUNDATION  
*Authorized by Congress as the Source of Appraisal  
Standards and Appraiser Qualifications*

Published in the United States of America.

ISBN: 978-0-9798728-9-1

All rights reserved.

No parts of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopy, recording or otherwise, without the prior written consent of the publisher.

**EFFECTIVE:**

**January 1, 2014 through  
December 31, 2015**

# EXHIBIT D

1434

## ETHICS RULE

254 If known prior to accepting an assignment, and/or if discovered at any time during the assignment,  
255 an appraiser must disclose to the client, and in each subsequent report certification:

- 256 • any current or prospective interest in the subject property or parties involved; and
- 257 • any services regarding the subject property performed by the appraiser within the three
- 258 year period immediately preceding acceptance of the assignment, as an appraiser or in any
- 259 other capacity.

260 Comment: Disclosing the fact that the appraiser has previously appraised the property is permitted  
261 except in the case when an appraiser has agreed with the client to keep the mere occurrence of a  
262 prior assignment confidential. If an appraiser has agreed with a client not to disclose that he or she  
263 has appraised a property, the appraiser must decline all subsequent assignments that fall within the  
264 three year period.

265 In assignments in which there is no appraisal or appraisal review report, only the initial disclosure  
266 to the client is required.

### 267 Management:

268 An appraiser must disclose that he or she paid a fee or commission, or gave a thing of value in  
269 connection with the procurement of an assignment.

270 Comment: The disclosure must appear in the certification and in any transmittal letter in which  
271 conclusions are stated; however, disclosure of the amount paid is not required. In groups or  
272 organizations engaged in appraisal practice, intra-company payments to employees for business  
273 development do not require disclosure.

274 An appraiser must not accept an assignment, or have a compensation arrangement for an  
275 assignment, that is contingent on any of the following:

- 276 1. the reporting of a predetermined result (e.g., opinion of value);
- 277 2. a direction in assignment results that favors the cause of the client;
- 278 3. the amount of a value opinion;
- 279 4. the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced); or
- 280 5. the occurrence of a subsequent event directly related to the appraiser's opinions and specific
- 281 to the assignment's purpose.

282 An appraiser must not advertise for or solicit assignments in a manner that is false, misleading, or  
283 exaggerated.

284 An appraiser must affix, or authorize the use of, his or her signature to certify recognition and  
285 acceptance of his or her USPAP responsibilities in an appraisal or appraisal review assignment (see  
286 Standards Rules 2-3, 3-6, 6-9, 8-3, and 10-3). An appraiser may authorize the use of his or her  
287 signature only on an assignment-by-assignment basis.

288 An appraiser must not affix the signature of another appraiser without his or her consent.

289 Comment: An appraiser must exercise due care to prevent unauthorized use of his or her signature.  
290 An appraiser exercising such care is not responsible for unauthorized use of his or her signature.

## STANDARD 1

- 607 (e) When analyzing the assemblage of the various estates or component parts of a property, an  
608 appraiser must analyze the effect on value, if any, of the assemblage. An appraiser must refrain  
609 from valuing the whole solely by adding together the individual values of the various estates or  
610 component parts.

611 Comment: Although the value of the whole may be equal to the sum of the separate estates or  
612 parts, it also may be greater than or less than the sum of such estates or parts. Therefore, the  
613 value of the whole must be tested by reference to appropriate data and supported by an  
614 appropriate analysis of such data.

615 A similar procedure must be followed when the value of the whole has been established and  
616 the appraiser seeks to value a part. The value of any such part must be tested by reference to  
617 appropriate data and supported by an appropriate analysis of such data.

- 618 (f) When analyzing anticipated public or private improvements, located on or off the site, an  
619 appraiser must analyze the effect on value, if any, of such anticipated improvements to the extent  
620 they are reflected in market actions.

- 621 (g) When personal property, trade fixtures, or intangible items are included in the appraisal, the  
622 appraiser must analyze the effect on value of such non-real property items.

623 Comment: When the scope of work includes an appraisal of personal property, trade fixtures  
624 or intangible items, competency in personal property appraisal (see STANDARD 7) or  
625 business appraisal (see STANDARD 9) is required.

### 626 Standards Rule 1-5

627 When the value opinion to be developed is market value, an appraiser must, if such information is  
628 available to the appraiser in the normal course of business:<sup>14</sup>

- 629 (a) analyze all agreements of sale, options, and listings of the subject property current as of the  
630 effective date of the appraisal; and

- 631 (b) analyze all sales of the subject property that occurred within the three (3) years prior to the  
632 effective date of the appraisal.<sup>15</sup>

633 Comment: See the Comments to Standards Rules 2-2(a)(viii) and 2-2(b)(viii) for  
634 corresponding reporting requirements relating to the availability and relevance of information.

### 635 Standards Rule 1-6

636 In developing a real property appraisal, an appraiser must:

- 637 (a) reconcile the quality and quantity of data available and analyzed within the approaches used;  
638 and

- 639 (b) reconcile the applicability and relevance of the approaches, methods and techniques used to  
640 arrive at the value conclusion(s).

<sup>14</sup> See Advisory Opinion 24, *Normal Course of Business*.

<sup>15</sup> See Advisory Opinion 1, *Sales History*.

710 When an opinion of reasonable exposure time has been developed in compliance  
711 with Standards Rule 1-2(c), the opinion must be stated in the report.<sup>20</sup>

712 (vi) state the effective date of the appraisal and the date of the report;<sup>21</sup>

713 Comment: The effective date of the appraisal establishes the context for the value  
714 opinion, while the date of the report indicates whether the perspective of the  
715 appraiser on the market and property as of the effective date of the appraisal was  
716 prospective, current, or retrospective.

717 (vii) summarize the scope of work used to develop the appraisal;<sup>22</sup>

718 Comment: Because intended users' reliance on an appraisal may be affected by the  
719 scope of work, the report must enable them to be properly informed and not misled.  
720 Sufficient information includes disclosure of research and analyses performed and  
721 might also include disclosure of research and analyses not performed.

722 When any portion of the work involves significant real property appraisal assistance,  
723 the appraiser must summarize the extent of that assistance. The name(s) of those  
724 providing the significant real property appraisal assistance must be stated in the  
725 certification, in accordance with Standards Rule 2-3.<sup>23</sup>

726 (viii) summarize the information analyzed, the appraisal methods and techniques employed,  
727 and the reasoning that supports the analyses, opinions, and conclusions; exclusion of the  
728 sales comparison approach, cost approach, or income approach must be explained;

729 Comment: An Appraisal Report must include sufficient information to indicate that  
730 the appraiser complied with the requirements of STANDARD 1. The amount of  
731 detail required will vary with the significance of the information to the appraisal.

732 The appraiser must provide sufficient information to enable the client and intended  
733 users to understand the rationale for the opinions and conclusions, including  
734 reconciliation of the data and approaches, in accordance with Standards Rule 1-6.

735 When reporting an opinion of market value, a summary of the results of analyzing  
736 the subject sales, agreements of sale, options, and listings in accordance with  
737 Standards Rule 1-5 is required.<sup>24</sup> If such information is unobtainable, a statement on  
738 the efforts undertaken by the appraiser to obtain the information is required. If such  
739 information is irrelevant, a statement acknowledging the existence of the information  
740 and citing its lack of relevance is required.

741 (ix) state the use of the real estate existing as of the date of value and the use of the real  
742 estate reflected in the appraisal;

<sup>20</sup> See Statement on Appraisal Standards No. 6, *Reasonable Exposure Time in Real Property and Personal Property Opinions of Value*. See also Advisory Opinion 7, *Marketing Time Opinions*, and Advisory Opinion 22, *Scope of Work in Market Value Appraisal Assignments, Real Property*.

<sup>21</sup> See Statement on Appraisal Standards No. 3, *Retrospective Value Opinions*, and Statement on Appraisal Standards No. 4, *Prospective Value Opinions*.

<sup>22</sup> See Advisory Opinion 28, *Scope of Work Decision, Performance, and Disclosure*, and Advisory Opinion 29, *An Acceptable Scope of Work*.

<sup>23</sup> See Advisory Opinion 31, *Assignments Involving More than One Appraiser*.

<sup>24</sup> See Advisory Opinion 1, *Sales History*.

774 Comment: When an opinion of reasonable exposure time has been developed in  
775 compliance with Standards Rule 1-2(c), the opinion must be stated in the report.

776 (vi) state the effective date of the appraisal and the date of the report;<sup>29</sup>

777 Comment: The effective date of the appraisal establishes the context for the value  
778 opinion, while the date of the report indicates whether the perspective of the  
779 appraiser on the market and property as of the effective date of the appraisal was  
780 prospective, current, or retrospective.

781 (vii) state the scope of work used to develop the appraisal;<sup>30</sup>

782 Comment: Because the client's reliance on an appraisal may be affected by the scope  
783 of work, the report must enable them to be properly informed and not misled.  
784 Sufficient information includes disclosure of research and analyses performed and  
785 might also include disclosure of research and analyses not performed.

786 When any portion of the work involves significant real property appraisal assistance,  
787 the appraiser must state the extent of that assistance. The name(s) of those providing  
788 the significant real property appraisal assistance must be stated in the certification, in  
789 accordance with Standards Rule 2-3.<sup>31</sup>

790 (viii) state the appraisal methods and techniques employed, state the value opinion(s) and  
791 conclusion(s) reached, and reference the workfile; exclusion of the sales comparison  
792 approach, cost approach, or income approach must be explained;

793 Comment: An appraiser must maintain a specific, coherent workfile in support of a  
794 Restricted Appraisal Report. The contents of the workfile must include sufficient  
795 information to indicate that the appraiser complied with the requirements of  
796 STANDARD 1 and for the appraiser to produce an Appraisal Report.

797 When reporting an opinion of market value, a summary of the results of analyzing  
798 the subject sales, agreements of sale, options, and listings in accordance with  
799 Standards Rule 1-5 is required. If such information is unobtainable, a statement on  
800 the efforts undertaken by the appraiser to obtain the information is required. If such  
801 information is irrelevant, a statement acknowledging the existence of the information  
802 and citing its lack of relevance is required.

803 (ix) state the use of the real estate existing as of the date of value and the use of the real  
804 estate reflected in the appraisal;

805 (x) when an opinion of highest and best use was developed by the appraiser, state that  
806 opinion;

807 (xi) clearly and conspicuously:

808 • state all extraordinary assumptions and hypothetical conditions; and

<sup>29</sup> See Statement on Appraisal Standards No. 3, *Retrospective Value Opinions*, and Statement on Appraisal Standards No. 4, *Prospective Value Opinions*.

<sup>30</sup> See Advisory Opinions 28, *Scope of Work Decision, Performance, and Disclosure*, and Advisory Opinion 29, *An Acceptable Scope of Work*.

<sup>31</sup> See Advisory Opinion 31, *Assignments Involving More than One Appraiser*.



**Appraisal  
Institute®**

*Professionals Providing  
Real Estate Solutions*

# The Appraisal of Real Estate

THIRTEENTH EDITION

owing publica-

on

cations in Valu-

NOTE

Appraisal Institute • 550 West Van Buren • Chicago, IL 60607 • [www.appraisalinstitute.org](http://www.appraisalinstitute.org)

The Appraisal Institute advances global standards, methodologies, and practices through the professional development of property economics worldwide.

## EXHIBIT E

1439



## Income and Expense Analysis

To apply any capitalization procedure, a reliable estimate of income expectancy must be developed. Although some capitalization procedures are based on the actual level of income at the time of the appraisal, all must eventually consider a projection of future income. An appraiser must consider the future outlook both in the estimate of income and expenses and in the selection of the appropriate capitalization methodology to use. Failure to consider future income would contradict the principle of anticipation, which holds that value is the present worth of future benefits.

Historical income and current income are significant, but the ultimate concern is the future. The earning history of a property is important only insofar as it is accepted by buyers as an indication of the future. Current income is a good starting point, but the direction and expected pattern of income change are critical to the capitalization process.

Many types of first-year income can be converted into value estimates for different property interests using direct capitalization. Some examples are

- Potential gross income (*PGI*)
- Effective gross income (*EGI*)
- Net operating income (*NOI* or *I<sub>O</sub>*)
- Equity cash flow (*I<sub>E</sub>*)

In the direct capitalization approach, four income streams may be analyzed: potential gross income (*PGI*), effective gross income (*EGI*), net operating income (*NOI* or *I<sub>O</sub>*), and equity cash flow (*I<sub>E</sub>*).

ar 4 Budget	
ars	Per Square Foot
.400	\$5.39
.100	0.34
350	\$4.14
250	1.42
750	2.28
600	0.21
825	0.88
800	0.08
850	0.18
500	0.89
600	0.01
025	\$15.82

E	
e Commerce Plaza	
2008	
2001	
66,000	
\$5.35	
0.27	
\$3.45	
1.55	
1.30	
0.21	
0.38	
0.10	
0.11	
1.00	
0.01	
\$13.73	

marizes the operating expenses of five comparable properties in the same market area and allows for easy comparison of the subject property and the comparables. It is obvious that the total operating expenses of the subject, at \$15.82 per square foot for the year being studied, are significantly higher than those of the comparables, which range from \$13.73 to \$15.07 per square foot. For most of the operating expenses listed, the per-unit expenses for the subject fall within the ranges set by the comparable properties, but the expenses for electricity, at \$4.14 per square foot, and cleaning, at \$2.28 per square foot, are higher than for any of the comparables. In the income and expense analysis, the appraiser will have to investigate the reasons for the higher costs of electricity and cleaning for the subject property.

After thoroughly analyzing property and lease data for the subject and comparable properties, the appraiser develops a net operating income estimate for the subject property. If the appraiser is focusing on the benefits accruing to the equity investment, the equity dividend is also estimated.

### Potential Gross Income

Appraisers usually analyze potential gross income on an annual basis. Potential gross income comprises

- Rent for all space in the property—e.g., contract rent for current leases, market rent for vacant or owner-occupied space, percentage and overage rent for retail properties
- Rent from escalation clauses
- Reimbursement income
- All other forms of income to the real property—e.g., income from services supplied to the tenants, such as secretarial service, switchboard service, antenna connections, storage, garage space, and income from coin-operated equipment and parking fees

Because service-derived income may or may not be attributable to the real property, an appraiser might find it inappropriate to include this income in the property's potential gross income. The appraiser may treat such income as business income or as personal property income, depending on its source. If a form of income is subject to vacancy and collection loss, it should be incorporated into potential gross income, and the appropriate vacancy and collection charge should be made to reflect effective gross income.

### Vacancy and Collection Loss

Vacancy and collection loss is an allowance for reductions in potential gross income attributable to vacancies, tenant turnover, and nonpayment of rent or other income. This line item considers two components:

Income estimates are developed by analyzing information on the subject and competitive properties, i.e., individual income and expense histories, recent transactional data (signed leases, rents asked and offered), vacancy levels, and management expenses. Published operating data, tax assessment policies, projected utility rates, and market expectations should also be investigated.



#### **vacancy and collection loss**

A deduction from potential gross income (PGI) made to reflect income reductions due to vacancies, tenant turnover, and nonpayment of rent; also called *vacancy and credit loss* or *vacancy and contingency loss*. Often it is expressed as a percent of PGI and should reflect the competitive market. Its treatment can differ according to the interest being appraised, property type, capitalization method, and whether the property is at stabilized occupancy.

- Physical vacancy as a loss in income
- Collection loss caused by concessions or default by tenants

The rents collected each year are typically less than annual potential gross income, so an allowance for vacancy and collection loss is usually included in the appraisal of income-producing property. The allowance is usually estimated as a percentage of potential gross income, which varies depending on the type and characteristics of the physical property; the quality of its tenants; the type and level of income streams; current and projected mar-

ket supply and demand conditions; and national, regional, and local economic conditions.

Published surveys of similar properties under similar conditions may indicate an appropriate percentage allowance for vacancy and collection loss. An appraiser should survey the local market to support the vacancy estimate. The conclusion in the income capitalization approach may differ from the current vacancy level indicated by primary or secondary data because the estimate reflects typical investor expectations for the subject property only over the projection period. Other methods of measuring vacancy and collection loss include comparing potential gross income at market rates against the subject property's actual collected income.

#### **Effective Gross Income**

Effective gross income is calculated as the potential gross income minus the vacancy and collection loss allowance.

#### **Operating Expenses**

Operating expenses may be recorded in categories selected by the property owner. The records also may follow a standard system of accounting established by an association of owners or by accounting firms that serve a particular segment of the real estate market. Generally, operating expenses are divided into three categories:

1. Fixed expenses
2. Variable expenses
3. Replacement allowance

However operating expenses are organized, an appraiser analyzes and reconstructs expense statements to develop an estimate of the typical operating expense forecast for the property on an annual cash basis.

#### **Fixed Expenses**

Most reconstructed operating statements contain line items for real estate taxes and building insurance costs. Tax data can be found in

public records, and the assessor's office may provide information about projected changes in assessments or rates and their probable effect on future taxes. If a property is assessed unfairly, the real estate tax expense may need to be adjusted in the reconstructed operating statement. If the subject property has an unusually low assessment compared to other, similar properties or appears to deviate from the general pattern of taxation in the jurisdiction, the most probable amount and trend of future taxes must be considered. Any past changes in the assessment of the subject property should be studied. If the assessment is low, the assessor may be required by law to raise it. If the figure is high, however, a reduction may not be easily obtained. In projecting real estate taxes, an appraiser tries to anticipate tax assessments based on past tax trends, present taxes, the municipality's future expenditures, and the perceptions of market participants. Because the concept of market value presumes a sale, the real estate tax projection should consider the impact of the presumed sale on the anticipated assessed value and taxes.

For proposed properties or properties that are not currently assessed, appraisers can develop operating statement projections without including real estate taxes. The resulting estimate is net operating income before real estate taxes, and a provision for real estate taxes is included in the capitalization rate used to convert this net income into property value. For example, suppose that real estate taxes are typically 2% of market value and net operating income after real estate taxes would normally be capitalized at 11% to derive an opinion of market value for the subject property. In this case, the estimated net operating income before real estate taxes could be capitalized at 13% ( $11\% + 2\%$ , which is known as a *loaded capitalization rate*) to derive a property value indication. Alternatively, the appraiser may choose to estimate real estate taxes for a proposed project based on building costs or the taxes paid by recently constructed, competitive properties. Any unusual, unpaid special assessments or other mandatory, one-time expenses should be addressed as a lump-sum adjustment at the end of the analysis, if that is what market participants would do.

An owner's operating expense statement may show the insurance premiums paid on a cash basis. If the premiums are not paid annually, they must be adjusted to a hypothetical annual cash expense before they are included in the reconstructed operating statement. Fire, extended coverage, and owner's liability insurance are typical insurance items. Depending on the type of property, elevators, boilers, plate glass, or other items may also be insured. The appraiser must determine the amount of insurance and, if it is inadequate or superadequate, adjust the annual cost to indicate appropriate coverage for the property. As

#### operating expenses

The periodic expenditures necessary to maintain the real property and continue production of the effective gross income, assuming prudent and competent management.

#### fixed expenses

Operating expenses that generally do not vary with occupancy and that prudent management will pay for whether the property is occupied or vacant.

---

# APPRAISING PARTIAL INTERESTS

---

*By David Michael Keating, MAI*



875 North Michigan Avenue  
Chicago, Illinois 60611

[www.appraisalinstitute.org](http://www.appraisalinstitute.org)

**EXHIBIT F**

**1444**

isal

upside potential. Of course, the tenant's credit rating, the remaining term of the lease, and other such factors must also be considered. Generally, low-risk, AAA-type tenants have lower yield rates than less creditworthy tenants due to the lower risk of default. The discount rate may not vary much if the remaining term of the lease is very short.

In this example, the prevailing discount rate is 12%. It is important to note that this discount rate only applies to the favorable lease position, not to the reversion value based on a return to market rent levels. As such, a lower rate of 11% will be applied during the term of the lease and a market rate of 12% will be applied to the reversion.

To perform a cash flow analysis when a below-market rent is specified, cash flows are projected through to the point at which contract rent converts to market rent and the property achieves a stabilized position in the market. In this case a six-year cash flow analysis is presented. The analysis includes five years of contract rent and one year of rent that has returned to typical market levels. If this were a multitenant property and several of the tenants were paying below-market rents, then additional years might have been included in the analysis to consider the likelihood of increased vacancy and slower absorption of space after conversion to market rental rates.

The cash flow solution to the example is provided in Table 1.1.

**Table 1.1** Cash Flow Analysis of Leased Fee Estate: Contract Rents Less Than Market Rents

Year	1	2	3	4	5	6
Contract rent	\$630,000	\$630,000	\$630,000	\$630,000	\$630,000	\$0
Market rent	0	0	0	0	0	900,000
Potential gross income	\$630,000	\$630,000	\$630,000	\$630,000	\$630,000	\$900,000
Less vacancy factor	0%	0%	0%	0%	0%	7%
Effective gross income	\$630,000	\$630,000	\$630,000	\$630,000	\$630,000	\$837,000
Less operating expenses:						
Management @1%	6,300	6,300	6,300	6,300	6,300	8,370
Reserves at \$0.025/sq. ft.	7,500	7,500	7,500	7,500	7,500	7,500
Net operating income	\$616,200	\$616,200	\$616,200	\$616,200	\$616,200	\$821,130
Reversion at terminal capitalization rate of 11.5%						\$7,140,261
Cash flows	\$616,200	\$616,200	\$616,200	\$616,200	\$616,200	
Discount factor @11%	0.9009	0.8116	0.7312	0.6587	0.5935	
Present value of cash flows	\$555,135	\$500,108	\$450,565	\$405,891	\$365,715	
Subtotal	\$2,277,414					
Add present value of reversion discounted at 12%, 5 years	4,051,384					
Total	\$6,328,798					
Rounded to	\$6,330,000					

# INCOME APPROACH TO VALUE (LEASED FEE)

## Gross Potential Income:

### Rental Income:

Silver Mountain  
Ski Shop

"As Is"

\$59,525.00

27,012.00

SUBTOTAL:

\$86,537.00

Suite 5 (NNN)  
Wildcat Pizza (7A) (NNN)  
Mountain Café (7B) (NNN)  
Suite 7C (NNN)

"As Is"

\$ 4,696

8,773

4,205

16,716

SUBTOTAL:

\$ 34,390

Gross Potential Rental Income

\$ 120,927

Total Expense Reimbursement (tax reduction of \$13,770.00)

\$51,721.00<sup>1</sup>

Total Potential Gross Income

\$ 172,648

### Vacancy Allowance:

Silver Mountain/Ski Shop ( 5 %)

\$ (4,327)

(Suites 5, 7A, 7B, and 7C) ( 22 %)

\$ (7,566)

### Total Effective Gross Income:

\$ 160,755

### Operating Expenses:

#### Reimbursed Expenses:

Real Estate Taxes

\$18,253.00

Insurance

1,757.00

Utilities (HOA)

30,874.00

Maintenance & Repairs

\$ 837.00

SUBTOTAL:

\$51,721.00

Management Fee

10,200.00<sup>2</sup>

Replacement Reserve

837.00

### Net Operating Income:

\$ 97,997

Cap Rate

8.25%

Indicated Value

\$ 1,187,842

EXHIBIT 9



<sup>1</sup>Expense Reimbursements per Mundin (p. 36) less \$13,770.00 tax overstatement.

<sup>2</sup> Per Jim Koon Fee Agreement with Receiver (\$850.00 per month).

# INCOME APPROACH TO VALUE (LEASED FEE)

## Gross Potential Income:

### Rental Income:

Silver Mountain	"AS IS"	\$59,525.00
Ski Shop		<u>27,012.00</u>

SUBTOTAL:	<u>\$86,537.00</u>
-----------	--------------------

Suite 5 (NNN)		\$ <u>4,696</u>
Wildcat Pizza (7A) (NNN)	"AS IS"	<u>8,773</u>
Mountain Café (7B) (NNN)		<u>4,205</u>
Suite 7C (NNN)		<u>16,716</u>

SUBTOTAL:	<u>\$ 34,390</u>
-----------	------------------

Gross Potential Rental Income	\$ <u>120,927</u>
Total Expense Reimbursement (tax reduction of \$13,770.00) <sup>1</sup>	\$51,721.00 <sup>1</sup>
Total Potential Gross Income	<u>\$ 172,648</u>

### Vacancy Allowance:

Silver Mountain/Ski Shop ( <u>0</u> %)	\$ <u>-0-</u>
----------------------------------------	---------------

(Suites 5, 7A, 7B, and 7C) ( <u>22</u> %)	\$ <u>(7,566)</u>
-------------------------------------------	-------------------

<u>Total Effective Gross Income:</u>	<u>\$ 165,082</u>
--------------------------------------	-------------------

### Operating Expenses:

#### Reimbursed Expenses:

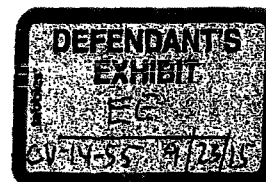
Real Estate Taxes	\$18,253.00
Insurance	1,757.00
Utilities (HOA)	30,874.00
Maintenance & Repairs	<u>\$ 837.00</u>
SUBTOTAL:	\$51,721.00

Management Fee	10,200.00 <sup>2</sup>
Replacement Reserve	837.00

<u>Net Operating Income:</u>	<u>\$ 102,324</u>
------------------------------	-------------------

Cap Rate	8.25%
Indicated Value	<u>\$ 1,240,291</u>

# EXHIBIT H



<sup>1</sup>Expense Reimbursements per Mundin (p. 36) less \$13,770.00 tax overstatement.

<sup>2</sup> Per Jim Koon Fee Agreement with Receiver (\$850.00 per month).

(3)

INCOME APPROACH TO VALUE  
(LEASED FEE)

Gross Potential Income:

Rental Income:

Silver Mountain	"AS IS"	\$59,525.00
Ski Shop		27,012.00
	SUBTOTAL:	\$86,537.00

Suite 5 (NNN)		\$ 4,696
Wildcat Pizza (7A) (NNN)	"MARKET"	16,716
Mountain Café (7B) (NNN)		13,344
Suite 7C (NNN)		16,716
	SUBTOTAL:	\$ 51,472

Gross Potential Rental Income	\$ 138,009
Total Expense Reimbursement (tax reduction of \$13,770.00)	\$51,721.00 <sup>1</sup>
Total Potential Gross Income	\$ 189,730

Vacancy Allowance:

Silver Mountain/Ski Shop ( 5 %)	\$ (4,327)
(Suites 5, 7A, 7B, and 7C) (22 %)	\$ (11,324)

<u>Total Effective Gross Income:</u>	\$ 174,079
--------------------------------------	------------

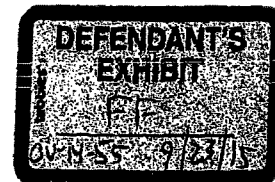
Operating Expenses:

Reimbursed Expenses:

Real Estate Taxes	\$18,253.00
Insurance	1,757.00
Utilities (HOA)	30,874.00
Maintenance & Repairs	\$ 837.00
SUBTOTAL:	\$51,721.00

Management Fee	10,200.00 <sup>2</sup>
Replacement Reserve	837.00
<u>Net Operating Income:</u>	\$ 111,321
Cap Rate	8.25%
Indicated Value	\$ 1,349,345

EXHIBIT I



<sup>1</sup>Expense Reimbursements per Mundin (p. 36) less \$13,770.00 tax overstatement.

<sup>2</sup> Per Jim Koon Fee Agreement with Receiver (\$850.00 per month).

(4)

# INCOME APPROACH TO VALUE (LEASED FEE)

## Gross Potential Income:

### Rental Income:

Silver Mountain  
Ski Shop

"AS IS"

\$59,525.00

27,012.00

SUBTOTAL:

\$86,537.00

Suite 5 (NNN)  
Wildcat Pizza (7A) (NNN)  
Mountain Café (7B) (NNN)  
Suite 7C (NNN)

"MARKET"

\$ 4,696

16,716

13,344

16,716

SUBTOTAL:

\$ 51,472

Gross Potential Rental Income

\$ 138,009

Total Expense Reimbursement (tax reduction of \$13,770.00)

\$51,721.00<sup>1</sup>

Total Potential Gross Income

\$ 189,730

### Vacancy Allowance:

Silver Mountain/Ski Shop (0 %)

\$ -0-

(Suites 5, 7A, 7B, and 7C) (22 %)

\$ (11,324)

### Total Effective Gross Income:

\$ 178,406

### Operating Expenses:

#### Reimbursed Expenses:

Real Estate Taxes

\$18,253.00

Insurance

1,757.00

Utilities (HOA)

30,874.00

Maintenance & Repairs

\$ 837.00

SUBTOTAL:

\$51,721.00

Management Fee

10,200.00<sup>2</sup>

Replacement Reserve

837.00

### Net Operating Income:

\$ 115,648

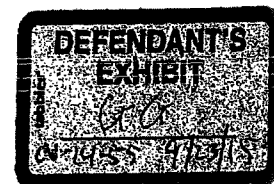
Cap Rate

8.25%

Indicated Value

\$ 1,401,794

# EXHIBIT J



<sup>1</sup>Expense Reimbursements per Mundin (p. 36) less \$13,770.00 tax overstatement.

<sup>2</sup> Per Jim Koon Fee Agreement with Receiver (\$850.00 per month).



**INCOME APPROACH TO VALUE  
(LEASED FEE)**

Gross Potential Income:

Rental Income:

Silver Mountain	"AS IS"	\$59,525.00
Ski Shop		<u>27,012.00</u>
SUBTOTAL:		<u>\$86,537.00</u>

Suite 5 (NNN)	"MARKET"	\$ <u>4,696</u>
Wildcat Pizza (7A) (NNN)		<u>16,716</u>
Mountain Café (7B) (NNN)		<u>13,344</u>
Suite 7C (NNN)		<u>16,716</u>
SUBTOTAL:		<u>\$51,472</u>

Gross Potential Rental Income	\$ <u>138,009</u>
Total Expense Reimbursement (tax reduction of \$13,770.00)	\$51,721.00 <sup>1</sup>
Total Potential Gross Income	<u>\$189,730</u>

Vacancy Allowance:

Silver Mountain/Ski Shop ( <u>5</u> %)	\$ <u>(4,327)</u>
(Suites 5, 7A, 7B, and 7C) ( <u>40</u> %)	\$ <u>(20,588)</u>

<u>Total Effective Gross Income:</u>	<u>\$164,815</u>
--------------------------------------	------------------

Operating Expenses:

Reimbursed Expenses:

Real Estate Taxes	\$18,253.00
Insurance	1,757.00
Utilities (HOA)	30,874.00
Maintenance & Repairs	<u>\$ 837.00</u>
SUBTOTAL:	\$51,721.00

Management Fee	10,200.00 <sup>2</sup>
Replacement Reserve	837.00
<u>Net Operating Income:</u>	<u>\$102,057</u>

**EXHIBIT K**

<sup>1</sup>Expense Reimbursements per Mundin (p. 36) less \$13,770.00 tax overstatement.

<sup>2</sup> Per Jim Koon Fee Agreement with Receiver (\$850.00 per month).

Gross Potential Rental Income - Silver Mountain:	\$86,537
Less 5% Vacancy:	(4,327)
Net Potential Rental Income - Silver Mountain:	\$82,210
<hr/>	
Gross Potential Rental Income - 4 Other Units:	\$51,472
Less 40% Vacancy:	(20,588)
Net Potential Rental Income - 4 Other Units:	\$30,884
Total Net Potential Rental Income:	\$113,094
Percentage of Net Potential Rental Income of Silver Mountain:	72.7%
Percentage of Net Potential Rental Income of 4 Other Units:	27.3%
<hr/>	
Net Operating Income:	\$102,057
Silver Mountain Share of Net Operating Income at 72.7%:	74,193
Other 4 Units Share of Net Operating Income at 27.3%:	27,864
Silver Mountain Income at 6.1% Cap Rate:	1,216,278
Other 4 Units Income at 8.25% Cap Rate:	337,745
<hr/>	
<b>TOTAL FAIR MARKET VALUE AS OF 3/5/15:</b>	<b>\$1,554,023</b>

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 OCT 20 PM 2:38

PEGGY WHITE  
CLERK DIST. COURT  
BY Paul Elliott  
DEPUTY  
By Fax

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**DEFENDANTS' MOTION  
TO STRIKE**

COME NOW Defendants Michael R Hulsey, individually, and SM Commercial Properties, LLC, an Idaho limited liability company, by and through their attorney of record, John F. Magnuson, and respectfully move the Court for entry of an order striking from the record that certain "Exhibit A" attached to the "Post-Trial Reply Brief of Plaintiff Washington Federal," filed on or about October 15, 2015.

### **I. BASES OF MOTION.**

This Motion to Strike is predicated upon three (3) bases. First, Exhibit A to Washington Federal's "Post-Trial Reply Brief" constitutes hearsay otherwise inadmissible under IRE 801 and 802. Second, Exhibit A appears to consist of the unsworn post-trial testimony of Vicki Mundlin, MAI. All testimony is required to be under oath. See IRE 603. Third, Washington Federal essentially attempts to create "re-direct testimony," on the part of Vicki Mundlin, after the close of evidence. Based upon the reasons set forth above, Exhibit A should be stricken.

### **II. ARGUMENT.**

Plaintiff Washington Federal called Vicki Mundlin, MAI to testify at trial as an expert appraiser. Ms. Mundlin's appraisal was admitted at trial as Exhibit 22. The Court can readily review Exhibit 22 to see what format Ms. Mundlin's work product takes. Ms. Mundlin's work product, admitted at trial as Exhibit 22, is identical in form to that of Exhibit A as attached to Washington Federal's "Post-Trial Reply Brief."

Washington Federal's "Post-Trial Reply Brief" offered no authentication for Exhibit A other than the following: "Attached to this Brief as Exhibit "A" are the calculations based upon the evidence already submitted which runs the calculations based upon the appraisal methodology asserted by Hulsey." See Post-Trial Reply Brief at p. 11. Exhibit A consists of far more than calculations. Exhibit A consists of calculations and eleven (11) narrative paragraphs of unsworn testimony facially identifiable as having been written by Vicki Mundlin post-trial.

Washington Federal had the opportunity to rehabilitate Ms. Mundlin on re-direct examination. Washington Federal should not now be able, following the close of evidence, to essentially ask Vicki Mundlin to write out testimony she may have wished she had given (but which

she didn't) for purposes of stapling the same onto the back of Washington Federal's briefing.

Washington Federal's approach is objectionable for the reasons set forth above. Ms. Mundlin may not offer unsworn testimony, after the close of evidence, in an attempt to rehabilitate herself or to establish opinions she did not give at trial.

At trial, the Court admitted Defendants' Exhibits DD-GG. Copies of those Exhibits were attached as Exhibits G through J to the Defendants' "Post-Trial Opening Brief," filed October 8, 2015. The calculations in those Exhibits were the subject of actual testimony at trial. Ms. Mundlin conceded that the calculations were true and correct based upon the assumptions contained therein.

On the other hand, Exhibit A, as attached to Washington Federal's "Post-Trial Reply Brief," is obviously offered to prejudice the trier of fact as a narrative substitute for actual testimony. Exhibit A as offered by Washington Federal is far different in kind and degree than Exhibits DD-GG as admitted at trial.

### III. CONCLUSION.

Based upon the reasons and authorities set forth above, Defendants respectfully request that the Court enter an order striking Exhibit A in the form attached to Washington Federal's "Post-Trial Reply Brief." In the alternative, the Court should strike all narrative sections contained in Exhibit A. The remaining calculations are of limited probative value.

Defendants do not request a hearing on this Motion. The parties have filed all of their post-trial briefs and post-trial reply briefs. Oral argument will not otherwise assist the Court in ruling upon the subject motion as the Court is well-acquainted with the facts and testimony admitted at trial and does not need additional oral argument to go over the same again.

DATED this 20<sup>th</sup> day of October, 2015.



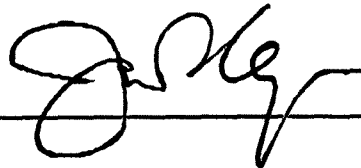
JOHN F. MAGNUSON  
Attorneys for Defendants  
SM Commercial Properties, LLC and  
Michael R. Hulsey

CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of October, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\386-9428



HULSEY-WA FED-STRIKE.MOT.wpd

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 OCT 21 PM 3:41

PEGGY WHITE  
CLERK DIST. COURT  
BY M. L. Hanson  
DEPUTY

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
tc@davisoncopples.com  
band@davisoncopples.com

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	WASHINGTON FEDERAL'S RESPONSE
vs.	)	TO DEFENDANTS' MOTION TO STRIKE
	)	
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	

\*\*\*

COMES NOW Plaintiff Washington Federal by and through its attorney of record, Terry

WASHINGTON FEDERAL'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE - I

1456

C. Copple of the firm Davison, Copple, Copple & Copple, LLP, of Boise, Idaho, and hereby responds to Defendant Michael R. Hulsey and SM Commercial Properties, LLC's pending October 20, 2015 Defendants' Motion To Strike Exhibit "A" Attached To Washington Federal's Post-Trial Reply Brief.

The Defendants' Motion is not well taken and should be denied by this Court on at least the following grounds.

First, Exhibit "A" to Washington Federal's Post-Trial Brief was not intended to be documentary evidence or "testimony" to the Court, but a hypothetical recalculation of the figures already in evidence made to illustrate a point. It is not evidence but argument. The Defendants would be better served to rebut the argument rather than simply try to exclude it.

Secondly, the calculations of the Defendants as well as Washington Federal's calculation in its Exhibit "A" are done to illustrate the effects of the information already in evidence being used in different ways. As such, they are simply arguments.

Finally, it seems particularly inappropriate for the Defendants to be complaining about three pages of written arguments when the Defendants themselves in Exhibits "D," "E" and "F" to their Post-Trial Opening Brief, attempt to admit into evidence twelve pages of new documentary evidence consisting of multiple pages from the Uniform Standards of Professional Appraisal Practice (Exhibit "D"), selected pages from The Appraisal of Real Estate book (Exhibit "E") and pages from Appraising Partial Interests (Exhibit "F") which were never admitted into evidence at all and which constitute new evidence.

Accordingly, we respectfully urge the Court to deny the Defendants' pending Motion To Strike.



DATED this 21<sup>st</sup> day of October, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_\_\_\_

  
Terry C. Copple, of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>st</sup> day of October, 2015, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
Terry C. Copple

TERRY C. COPPLE (ISB No. 1925)  
 MICHAEL E. BAND (ISB No. 8480)  
 DAVISON, COPPLE, COPPLE & COPPLE, LLP  
 Attorneys at Law  
 Chase Capitol Plaza  
 Post Office Box 1583  
 199 North Capitol Boulevard  
 Suite 600  
 Boise, Idaho 83701  
 Telephone: (208) 342-3658  
 Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

STATE OF IDAHO  
 COUNTY OF SHOSHONE/SS  
 FILED

2015 OCT 21 PM 3:41

PEGGY WHITE  
 CLERK DIST. COURT  
 BY M. Malachuk  
 DEPUTY

Attorneys for Plaintiff  
 Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	PLAINTIFF WASHINGTON FEDERAL'S
vs.	)	MOTION TO STRIKE
	)	
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	
	)	

\*\*\*

COMES NOW, Plaintiff Washington Federal, by and through its attorney of record,  
 Terry C. Copple, of the firm Davison, Copple, Copple & Copple, LLP of Boise, Idaho, and  
 hereby moves the Court to issue its Order striking Exhibit "D" (Uniform Standards of

PLAINTIFF WASHINGTON FEDERAL'S MOTION TO STRIKE - 1

Professional Appraisal Practice), Exhibit "E" (The Appraisal of Real Estate) and Exhibit "F" (Appraising Partial Interests) attached to the October 7, 2015 Post-Trial Opening Brief of Defendants Hulsey and SM Commercial Properties, LLC, on the ground and for the reason that the exhibits were never admitted into evidence at trial and thus the exhibits and any argument advanced by Defendants in their Post-Trial Opening Brief that are based on them should be stricken. The use of unadmitted exhibits in the brief of Defendants is improper because Plaintiff was never permitted to supplement the evidence by other and different provisions of the standards fully supporting the testimony and methodology employed by Vicki K. Mundlin.

No oral argument is requested on this Motion.

DATED this 21 day of October, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: 

Terry C. Copple, of the firm  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of October, 2015, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson  
1250 Northwood Center Court Suite A  
P.O. Box 2350  
Coeur d'Alene, ID 83816  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: [john@magnusononline.com](mailto:john@magnusononline.com)

  
Terry C. Copple

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 OCT 23 PM 4:46

PEGGY WHITE  
CLERK DIST. COURT  
BY *John F. Magnuson*  
DEPUTY

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF WASHINGTON  
FEDERAL'S "MOTION TO STRIKE"**

COME NOW Defendants Michael R Hulsey, individually, and SM Commercial Properties, LLC, an Idaho limited liability company, by and through their attorney of record, John F. Magnuson, and respectfully object to Plaintiff Washington Federal's "Motion to Strike," dated October 21, 2015.

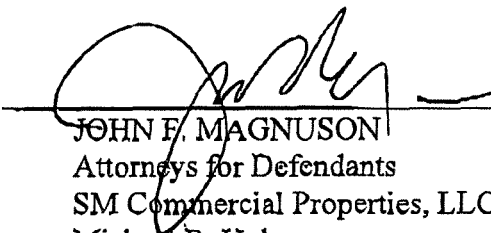
Plaintiff Washington Federal has moved the Court to strike Exhibits D, E, and F to the October 7, 2015 "Post-Trial Opening Brief of Defendants Hulsey and SM Commercial Properties, LLC." Washington Federal's Motion should be denied.

**DEFENDANT'S OPPOSITION TO PLAINTIFF  
WASHINGTON FEDERAL'S MOTION  
TO STRIKE - PAGE 1**

The referenced Exhibits consist of excerpts of the Uniform Standards of Professional Appraisal Practice (Exhibit D), the standards of the Appraisal Institute (Exhibit E), and additional standards of the Appraisal Institute (Exhibit F). Washington Federal's expert, Vicki Mundlin, MAI, offered testimony on cross-examination as to (1) the applicability of the Uniform Standards of Professional Appraisal Practice (USPAP); (2) her membership in the Appraisal Institute; and (3) the applicability and content of the standards quoted in Exhibits D through F. In fact, the standards were either read to Ms. Mundlin, or cited to her, and she acknowledged the applicability of the same, in her testimony on cross-examination.

The Exhibits as appended to the Defendants' Brief were not intended to be offered into evidence as "exhibits" themselves. Rather, they were intended to re-acquaint the Court, as the trier of fact, as to matters to which Ms. Mundlin testified on cross-examination. Plaintiff complains that it "was never permitted to supplement the evidence by other and different provisions of the standards fully-supporting the testimony and methodology employed by Vicki K. Mundlin." See Plaintiff Washington Federal's Motion to Strike at p. 2. Washington Federal was free to attempt to cite other standards to Ms. Mundlin on re-direct, or to attempt to elicit testimony as to why the referenced standards (Exhibits D through F) did not apply. Washington Federal failed to do so and should not be now heard to complain.

DATED this 23<sup>rd</sup> day of October, 2015.



---

JOHN F. MAGNUSON  
Attorneys for Defendants  
SM Commercial Properties, LLC and  
Michael R. Hulsey

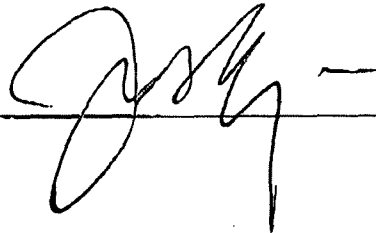
**DEFENDANT'S OPPOSITION TO PLAINTIFF  
WASHINGTON FEDERAL'S MOTION  
TO STRIKE - PAGE 2**

CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of October, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

☐ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE - 208\386-9428



---

HULSEY-WA FED-OBJ-STRIKE.BRF.wpd

DEFENDANT'S OPPOSITION TO PLAINTIFF  
WASHINGTON FEDERAL'S MOTION  
TO STRIKE - PAGE 3

1463

**FILED**  
STATE OF IDAHO  
COUNTY OF SHOSHONE / SS

NOV 18 2015

TIME: 120 AM/PM  
DEANA J. M. S.  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

<p>WASHINGTON FEDERAL, successor by merger to South Valley Bank &amp; Trust</p> <p>Plaintiff,</p> <p>vs.</p> <p>Michael R. HULSEY, individually; SM COMMERCIAL PROPERTIES, LLC, an Idaho limited liability company; SILVER MOUNTAIN CORPORATION, an Oregon corporation; MORNING STAR LODGE OWNERS ASSOCIATION, an Idaho non-profit association; JOHN and JANE DOES I-X; WHITE CORPORATIONS I-X</p> <p>Defendants</p>	<p>CASE NO. CV-2014-55</p> <p>MEMORANDUM DECISION</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------

**PROCEDURAL AND FACTUAL HISTORY:**

On September 22, 2015 this matter came on regularly for a one day court trial before Benjamin R. Simpson, Senior District Judge. The Plaintiff was represented by Terry C. Copple, of Davison, Copple, Copple, & Copple, LLP Attorneys at Law. The Defendants Michael R. Hulsey was represented by John F. Magnuson.

Based upon a series of stipulations and prior determinations by the assigned District Judge, Fred M. Gibler. The sole issue remaining for determination at trial was what was the fair market value of the subject commercial condominium units on March 5, 2015, the date the

subject real estate was sold at a mortgage foreclosure sale.

At the beginning of the trial the parties stipulated to the admission of the following exhibits, and they were admitted: Plaintiff's 1-22, 25-30, & 32-38. Plaintiff's exhibits 23, 24, 31, & 39 were not admitted by stipulation at the beginning of the trial. At the beginning of the trial the parties also stipulated to the admission of Defendants' U through Z, which were admitted. Defendants' BB and CC were stipulated to be withdrawn.

During the trial the court admitted Defendant's Exhibits A, I-L, P, and DD-II. No other defense exhibits were offered. During trial the court admitted Plaintiff's Exhibit 39. No other Plaintiff exhibits were offered.

After the trial each party submitted closing arguments, briefs, and a motion to strike. Plaintiff and Defendant informed the court clerk through counsel they did not desire oral argument on their respective motions to strike on October 26, 2015 and the court took the matter under advisement on that date.

At the beginning of the trial the parties agreed that the amount of the mortgage debt on the date of the foreclosure sale as set forth forth in Judge Gibler's decree of foreclosure was correct. There is was no agreement as to any additional amounts due since the date of the foreclosure sale.

The Court has received evidence, heard argument and has reviewed the files and records herein. The Court now being fully advised in the premises, and good cause appearing therefore,

The Court now enters its Memorandum Decision, which shall constitute the Court's findings of fact and conclusions of law Pursuant to Rule 52(a) of the Idaho Rules of Civil Procedure.

**MEMORANDUM DECISION:**



The issues before the Court are as follows:

1. **What is the court's ruling on Plaintiff Washington Federal's Motion in Limine to Exclude Evidence filed on September 15, 2015?**
2. **Should the court grant or deny the Defendants' Motion to strike Exhibit "A" to Plaintiff's Post-Trial Reply Brief of Plaintiff filed on or about October 15, 2015?**
3. **Should the court grant or deny Plaintiff Washington Federal's Motion to Strike filed October 21, 2015?**
4. **What was the fair market value of the subject commercial condominium units on March 5, 2015?**

**ANALYSIS:**

**1. Plaintiff's motion in limine.**

Plaintiff's September 15, 2015 motion in limine sought to exclude the following evidence by Defendants'. Exhibits A-T & AA as listed in Exhibit "A" to the motion in limine and all related testimony. Plaintiff asserts those exhibits should be excluded on the grounds they are irrelevant under Rule 402 of the Idaho Rules of Evidence given Judge Gibler's Judgment and Decree of Foreclosure dated August 18, 2014, which provides as follows:

9. That the Court specifically retains jurisdiction to determine the sole remaining issue after sheriff sale of the fair market value of the foregoing property as of the date of foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a deficiency judgment against Defendant Michael R. Hulsey.

At trial Defendants did not offer contested Exhibits B-H, M-O, Q-T, or AA-CC.

Therefore, any ruling on their exclusion in relation to the Plaintiff's Motion in Limine is moot.

The court admitted Defendant's Exhibits A,I, J, K, L, P, and DD-II during the trial. A review of the court's notes indicates the court stated at trial it admitted HH and II, but that was a misstatement. Exhibits DD-II were offered and were admitted. The court need not make any further ruling with regard to this portion of Plaintiff's motion in limine as the motion relates to specific exhibits.

One additional issue raised by Plaintiff's motion in limine is whether Defendant is barred by issue preclusion through collateral estoppel from re-litigation of the issue of fair market value of the subject property by the bankruptcy court's ruling in SM Commercial Properties, LLC's Chapter 11 bankruptcy. U.S. Bankruptcy Judge Meyer's decision in that bankruptcy related to determination of whether the Defendant SM Commercial Properties, LLC had any equity in the subject property as that determination was relevant to the issue whether the automatic stay should be lifted as requested by Plaintiff. A transcript of Judge Meyer's oral decision is in the record by stipulation of the parties as Exhibit "7". After a careful review of Judge Meyer's decision the court concludes that what Judge Meyer determined was that whether the fair market value of the subject property was \$780,000 as evidenced by Plaintiff's MAI appraisal (the court assumes this was Ms. Mundlin's appraisal, Exhibit "22) or the fair market value asserted by SM Commercial Properties, LLC established by the contingent \$1.5 Million contingent offer made by Mr. Cox, the Defendant had no equity in the subject property and the automatic stay should be lifted. This is because the amount of the debt owed by Defendant SM Commercial Properties, LLC in the bankruptcy case was uncontested at \$1.5 million, and even giving the debtor the benefit of the doubt, the amount of the debt was equal to or exceeded the fair market value of the property. Exhibit "7" pp. 10-12. Thus Judge Meyer did not determine the value of the subject property as asserted by Plaintiff.

The Defendant is not barred from litigating the fair market of the subject real property in the case at bar and the motion in limine is denied as to that issue.

**2. Defendant's Motion to Strike Exhibit "A" to Plaintiff's Post-Trial Reply Brief of Plaintiff filed on or about October 15, 2015?**

Defendants seek an order striking said exhibit on the grounds it is hearsay under Rules 801 and 802 of the Idaho Rules of Evidence, on the additional grounds the exhibit consists of unsworn post-trial testimony of Ms. Mundlin, and it is an attempt by Plaintiff to submit re-direct testimony of Ms. Mundlin after close of the evidence.

Defendant's motion to strike is granted based upon all three of the grounds asserted. Exhibit "A" to Plaintiff's post-trial brief is stricken from the record and will not be considered.

**3. Plaintiff Washington Federal's Motion to Strike filed October 21, 2015.**

Plaintiff filed its motion to strike Exhibits "D," "E," and "F" and any argument in the brief relating to them in Defendant's Post-Trial Opening Brief on the ground none of those exhibits were offered or admitted at trial. The court has considered the Plaintiff's motion and the Defendants' Opposition to Plaintiff Washington Federal's Motion to Strike.

First the court notes Mr. Magnuson did not intend those "exhibits" to be admitted. Second, those "exhibits" could properly have been used during the cross-examination of Ms. Mundlin at trial, but they were not. The court finds Mr. Magnuson did a thorough job of cross-examining Ms. Mundlin as to the professional standards that applied to her appraisal at trial. He did not elect to show her copies of the disputed standards at trial as part of his cross-examination. He cannot now supplement the

record post-trial as he did not lay a proper foundation for Ms. Mundlin to agree to, to reject, or to explain those excerpted express professional standards documents at trial. He cannot now bolster his cross-examination by submitting those standards after trial because Ms. Mundlin cannot reply to or explain whether she agrees or disagrees. It is improper cross-examination after the evidence has closed. To the extent Ms. Mundlin agreed any professional standards applied to her appraisal, Mr. Magnuson could have argued the requirements by reference in his argument like any other legal citation, but he did not.

The court grants Plaintiff's motion to strike those three exhibits and any argument in the Defendants' brief specifically referencing those exhibits.

**4. What was the fair market value of the subject commercial condominium units on March 5, 2015?**

As stated above, the sole issue tried to the court on September 22, 2015 was what was the fair market value of the subject real property commercial condominiums on the date of the foreclosure sale, March 5, 2015. The real property consists of 9 commercial condominium units in the Morningstar Lodge development at the base of the gondola at Silver Mountain Resort in Kellogg, Idaho. Those units are commercial units 1-4 and 6, which are leased to Silver Mountain Resort; and unit 5, 7A, 7B, and 7C. Exhibit "22" at p. 3

The parties agreed at the outset of the court trial as follows: a stipulated Judgment and Decree of Foreclosure (ORDER OF SALE)" was entered in this case on August 18, 2015, the judgment was for \$1,487,517.62 and post judgment interest. Exhibit 1. The judgment is secured by a deed of trust in favor of the Plaintiff. *I.B.I.D.* The

subject real property was sold to Plaintiff on a credit bid at sheriff's sale on March 5, 2015 for \$765,000. Exhibit 18.

The Plaintiff has the burden to prove the existence of a deficiency and the amount thereof by a preponderance of the evidence. I.C. § 6-108 *see also* Thompson V. Kirsch, 106 Idaho 177, 677 P.2d 490, (Ct. App. 1984). At trial Plaintiff's expert MAI appraiser Ms. Mundlin testified in support of her opinion that the fair market value on March 5, 2015 of the property was \$780,000. Her appraisal is in the record as Exhibit "22."

Ms. Mundlin's testimony did reference a purported opinion of value stated in a letter dated January 2014 of \$578,000 offered by Jim Koon, a very experienced local commercial real estate broker and commercial property manager who has familiarity with the property. Tr. Test. Mundlin. Mr. Koon's entire letter is in the record as Exhibit "JJ." After hearing the testimony of Mr. Hulsy, the testimony of Ms. Mundlin, after a review of Exhibits "22" & "JJ," the court concludes Mr. Koon's statement that the property was worth \$578,000 was prepared at the request of Mr. Hulsey and was intended to initiate settlement negotiations and was not intended to be Mr. Koon's or Mr. Hulsey's opinion of the fair market value of the property. The court does not find Exhibit "JJ" to be credible evidence of fair market value on March 5, 2015.

The only other witness who offered an opinion as to value of the property on March 5, 2015 was Defendant, Michael Hulsey. While Mr. Hulsey is not a professional appraiser he was the owner of the property for many years, including during the instant litigation, and he has many years of experience in the management,

financing, and valuation of commercial real estate, including the subject real property. Tr. Test. of Hulsey. Mr. Hulsey offered the opinion, based in part upon two expired contingent offers to purchase that the property was worth at least \$1,500,000. Tr. Test. of Hulsey. The contingency on each of those offers was the offeror's ability to also acquire Silver Mountain resort. Tr. Test. Hulsey. Both contingent offers expired before the contingency was met, but Mr. Hulsey testified there were, at the time of trial, ongoing negotiations by the same buyers to acquire Silver Mountain Resort. Tr. Test. Hulsey. While Mr. Hulsey is not a professional appraiser, the court finds his opinion as to value of the subject property is more credible than that of the typical commercial property owner.

As is usual and standard in the appraisal industry, Ms. Mundlin made several subjective assumptions in reaching her opinion as to fair market value, including, imputed vacancy rate, lease rates (actual and market), expense reimbursements (including management fees and tax burden), and capitalization rate. To a large degree the credibility on Ms. Mundlin's opinion as to fair market value turns upon the objective reasonableness of her subjective assumptions and the information she considered in reaching her opinion.

Defendant does not take exception to the overall methodology of Ms. Mundlin's appraisal, the income capitalization approach, but he does disagree with some of her assumptions, and the information she considered and did not consider, and her ultimate opinion as to fair market value.

Ms. Mundlin admitted she used subjective imputed vacancy rates for the properties as whole of 22 percent for her leased fee valuation and a 25 percent

imputed vacancy rate for the fee valuation. Leased fee means the fair market value of the property with the existing leases in place. Tr. Test. Mundlin. Fee means the fair market value of the property without the existing leases. Tr. Test. Mundlin. On cross-examination Ms. Mundlin admitted the units 1-4 and 6, leased to Silver Mountain Resort had an actual vacancy rate of 0.0 percent for over ten years and that the rent had always been paid. She further admitted that the use of those units was integral to the operation of the resort, that the resort is not likely to close, and that the leases were subject to renewal for up to 10 years. Tr. Test. Mundlin. Ms. Mundlin further admitted the units leased to Silver Mountain Resort could support an imputed vacancy rate of 2 percent or 5 percent although she justified her imputation of a vacancy rate at 22 percent of the whole property as a single lot and based upon her lowered overall capitalization rate of 8.25 percent. Ms. Mundlin's testimony also established an imputed vacancy rate anywhere from 22 percent to 44 percent would be justifiable for the other units not leased to Silver Mountain Resort. Tr. Test. Mundlin.

The court finds that the imputed vacancy rates used by Ms. Mundlin in her appraisal were excessive and were not reasonable under the existing facts. This had the effect of reducing the income used to calculate the fair market value and thus rendered her opinion regarding fair market value.

Ms. Mundlin imputed a management fee of 10 percent to the property. The management fee is a component of reasonable operating expenses to be used to determine fair market value. Yet Ms. Mundlin was aware the management fee was actually \$850 per month, which represented a 7 -8 percent management fee. Tr. Test.

Mundlin. Ms. Mundlin admitted the existing manager, Mr. Koon, was competent and qualified.

The effect of Ms. Mundlin's implied management fee in excess of the actual rate had the effect of increasing expenses, which in turn reduced net income and reduced her fair market value opinion.

The court concludes Ms. Mundlin's imputed management fee was excessive and was not reasonable under the circumstances.

Ms. Mundlin testified a reasonable manager would have contested the tax valuation of the property through the tax equalization process, which was assessed at \$1,367,710. She admitted that if that process were successful it would result in a substantial reduction of the tax burden, which is a factor in determining reasonable expenses to calculate fair market value. She admitted a reduction of the assessed value to \$780,000, Ms. Mundlin's opinion of fair market value, would reduce the taxes from \$32,000 to just under \$18,000 per year, which would substantially increase net income and fair market value. Ms. Mundlin admitted that the Appraisal Institute real estate appraisal publication standards required her consider what reasonable tax expenses might be while asserting that she did so in a downward adjustment of her imputed capitalization rate of 8.25 percent. Tr. Test. Mundlin.

The court finds Ms. Mundlin did not give adequate consideration to the effect of the excessive assessed value of the property, as said assessment would affect tax burden and the fair market value of the property at the time of sale.

Ms. Mundlin used an overall capitalization rate of 8.5 percent. She did so based upon the fact the subject property is resort property in a struggling resort. Tr. Test.



Mundlin. Ms. Mundlin, in part, defended her imputed capitalization rate by listing several comparables including the national tenant, NAPA Auto Parts in Post Falls to whom she imputed the capitalization rate of 6 percent given NAPA's stature and stability as a tenant. On cross-examination she acknowledged that Silver Mountain was part of a large national or international company, which operated a resort that required use of units most 1-4 and 6, and which had options for lease extensions of multiple years. Tr. Test. Mundlin. Ms. Mundlin agreed it is possible to market the units collectively or individually.

Ms. Mundlin admitted that she was not made aware of the existence of the contingent offers to purchase the subject property of \$1.5 million and \$2.0 million dollars when she performed her multiple appraisals, she completed four appraisals of the property, although those offers were known to Plaintiff. She further admitted that the applicable appraisal standards required consideration and reference to such offers, if known.

The court finds Plaintiff's failure to disclose the known contingent offers to Ms. Mundlin potentially skewed Ms. Mundlin's appraised value of the subject property.

Ms. Mundlin accepted the theoretical appraisal concept of assemblage value as a factor affecting fair market value where real property has greater value to a particular buyer because of synergy regarding a larger property assemblage involving adjacent property. Tr. Test. Mundlin. Ms. Mundlin did not agree it would be reasonable for her as an appraiser to take assemblage value into account in this appraisal, but she did acknowledge assemblage value could make the subject property more valuable to the owner or a potential buyer of Silver Mountain Resort.

During his cross-examination of Ms. Mundlin, Mr. Magnuson proposed several alternative assumptions regarding the subjective determinations using Ms. Mundlin's methodology from page 36 of Exhibit "22." Exhibits "DD"- "II" were admitted for illustrative purposes regarding Mr. Magnuson's hypothetical alternative assumptions and Ms. Mundlin's testimony about them. The court does not consider Defendants Exhibits "DD"- "II" as evidence of fair market value. The court only considers those exhibits to explain how the effect of Defendant's hypothetical changes in subjective assumptions might change fair market value as in Ms. Mundlin's appraisal.

In the first example, illustrated by Exhibit "DD," Mr. Magnuson reduced the tax burden assumption by \$13,770, reduced imputed vacancy rates for units 1-4 and 6 to 5 percent and used a 22 percent vacancy rate for the other units, and reduced the management fee to \$850 per month. Mr. Magnuson then asked Ms. Mundlin to confirm that using these revised assumptions and her methodology that the fair market value was \$1,187,000. She agreed.

In his second hypothetical revision of assumptions, Exhibit "EE" for illustration, Mr. Magnuson reduced the assumed vacancy rate to 0.0 percent on units 1-4 and 6. The example was otherwise consistent with his first hypothetical. Ms. Mundlin agreed those changes resulted in a fair market value of \$1,240,000 using her methodology.

In his third hypothetical, Exhibit "FF" for illustration, Mr. Magnuson substituted market rent for actual rents for the Wildcat Pizza and Mountain Café tenants, used a 5 percent vacancy rate for units 1-4 and 6, a 22 percent vacancy for the other units with actual management fees, applied the hypothetical reduced tax burden reduction, and

ran the calculations again using Ms. Mundlin's methodology. She agreed that produced a fair market value of \$1,349,000.

In his fourth hypothetical, Exhibit "GG" for illustration, Mr. Magnuson used Ms. Mundlin's 8.25 capitalization rate, used market rent for units 5, 7A, 7B, and 7C, reduced the taxes, lowered the vacancy rate for units 1-4 and 6 to 0.0 percent, and used the actual management fee. Ms. Mundlin agreed her methodology from page 36 of Exhibit "22" produced a fair market value of \$1,400,000.

In hypothetical number five, Exhibit "HH" for illustration, Mr. Magnuson Used actual rent for units 1-4 and 6, market rent for the rest of the units, reduced the taxes, reduced the Silver Mountain vacancy rate to 3 percent, and increased the vacancy rate of the rest of the units to 20 percent. Ms. Mundlin agreed her methodology yielded a fair market value of \$1,382,000.

Finally in hypothetical number six , Exhibit "II" for illustration, Mr. Magnuson assumed a 0.0 percent vacancy rate for units 1-4 and 6 and 20 percent for the other units with everything else the same as Exhibit "HH."Ms. Mundlin agreed her methodology produced a fair market valuation of \$1,414,000.

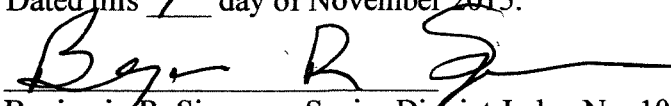
#### **CONCLUSION:**

The court is very well aware Ms. Mundlin disagrees with Mr. Magnuson's changes to her assumptions in the appraisal and in his hypothetical analyses. The court is very well aware of the reasons Ms. Mundlin testified to as support for her opinions. The court has thoroughly reviewed and considered the entire trial record. Because of the credible distinctions and inconsistencies raised by Mr. Magnuson in his cross-examination of Ms. Mundlin; because of the conflicting but credible opinion

of Mr. Hulsey, a licensed real estate broker and experienced commercial real estate investor and manager, supported by the assemblage value theory; because of the omission of the contingent offers by Washington Federal; and because of the profound change in appraised value illustrated by Mr. magnuson's hypothetical changes to Ms. Mundlin's subjective assumptions the court does not find Ms. Mundlin's determination of fair market value of \$780,000 to be credible. The court does not find that Mr. Hulsey's opinion of fair market value is more likely than not correct. Without accepting Mr. Hulsey's opinion as establishing fair market value court finds it is likely Mr. Hulsey's opinion is closer to the true fair market value of the subject property than Ms. Mundlin's. Ultimately the court's decision is based upon weighing the conflicting evidence and the credibility of Ms. Mundlin's opinion of fair market value. The court finds Ms. Mundlin's determination of fair market value not to be credible.

The court finds the Plaintiff has failed to meet its burden of proof as to the fair market value of the subject real property on March 5, 2015. Further, the court finds Plaintiff has failed to prove the existence of a deficiency between the fair market value of the property on March 5, 2015 and its credit bid of \$765,000.

Dated this 9<sup>th</sup> day of November 2015.

  
Benjamin R. Simpson, Senior District Judge No. 101

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed by me this 13 day of November, 2015, to:

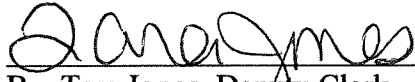
Terry C. Copple, Attorney at Law - *em*

Davison, Copple, Copple, & Copple, LLP - *em*  
By Fax: (208) 386-9428

John F. Magnuson, Attorney at Law - *em*  
By fax: (208) 667-0500

---

Peggy Delange-White, Clerk of the District Court

  
By, Tara Jones, Deputy Clerk

**FILED**

this 23 day of Dec

2015, at     o'clock     m.

Lorey Jones  
Deputy Clerk

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	
vs.	)	WASHINGTON FEDERAL'S MOTION
	)	FOR AWARD OF ATTORNEYS' FEES
	)	AND COSTS
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	
	)	

\* \* \*

COMES NOW Plaintiff Washington Federal by and through its attorney of record, Terry  
C. Copple of the firm Davison, Copple, Copple & Copple, LLP, of Boise, Idaho, and hereby

WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS - 1

moves the Court to issue its Order awarding Plaintiff Washington Federal its accrued attorneys' fees and costs as set forth in its Memorandum Of Costs And Attorneys' Fees and the Affidavit Of Terry C. Copple In Support Of Memorandum Of Costs And Attorneys' Fees, pursuant to Rule 54 of the Idaho Rules of Civil Procedure, the parties' Promissory Note, Deed Of Trust and related loan documentation.

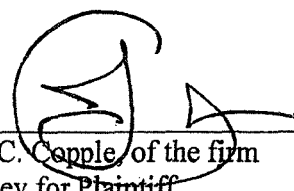
This Motion is made and based on the records and files herein. Oral argument is requested on this Motion.

DATED this 23<sup>RD</sup> day of December, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:

FUR

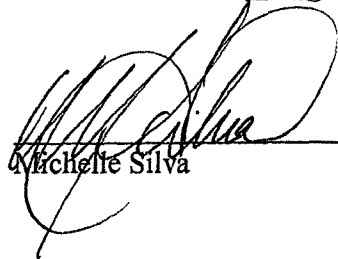
  
Terry C. Copple, of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of December, 2015, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
Michelle Silva



FILED

this 23 day of Dec.

2015 at o'clock m

Deputy Clerk

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by )  
merger to South Valley Bank & Trust, )  
Plaintiff, )

vs. )

MICHAEL R. HULSEY, individually; SM )  
COMMERCIAL PROPERTIES, LLC, an )  
Idaho limited liability company; SILVER )  
MOUNTAIN CORPORATION, an Oregon )  
corporation; MORNING STAR LODGE )  
OWNERS ASSOCIATION, an Idaho non- )  
profit association; JOHN and JANE DOES I- )  
X; WHITE CORPORATIONS I-X, )

Defendants. )

Case No. CV 2014 55

MEMORANDUM OF COSTS AND  
ATTORNEYS' FEES

\*\*\*

COMES NOW, Plaintiff Washington Federal, by and through its attorney of record,  
Terry C. Copple of the firm Davison, Copple, Copple & Copple of Boise, Idaho, and hereby sets  
forth the costs and attorneys' fees incurred in litigating this matter as follows from the date of the

MEMORANDUM OF COSTS AND ATTORNEYS' FEES - 1

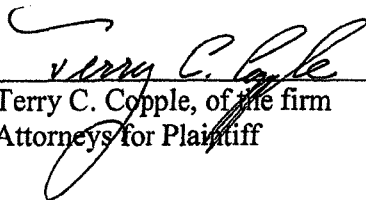
entry of the Judgment And Decree Of Foreclosure on August 18, 2014, through the successful completion of Washington Federal's Motion To Lift Automatic Stay filed in the Bankruptcy Court but excluding any costs and attorneys' fees incurred with regard to the preparation and trial on the issue of the fair market value of the real estate involved in the above-entitled foreclosure:

1.	Recording fee – Judgment of Foreclosure	\$ 28.00
2.	Fee to issue Writ for sale by Sheriff	\$ 2.00
3.	Shoshone County Sheriff – foreclosure service fees	\$ 410.34
4.	Recording fee – Writ of Execution for sale	\$ 40.00
5.	Bankruptcy Court Filing fee for Stay Lift Motion	\$ 176.00
6.	Court Fee to issue Writ	\$ 2.00
7.	Shoshone County Sheriff – foreclosure service fees for sale	\$ 540.00
8.	Shoshone County Sheriff – additional foreclosure service fees	\$ 227.79
9.	Certified Mail – to Sheriff re: credit bid	\$ 6.48
10.	Recording Fee – Certificate of Sale	\$ 13.00
11.	Recording Fee – Sheriff's Deed	\$ 25.00
12.	Attorney's Fees	\$26,706.00
Total:		\$28,176.61

DATED this 23 day of December, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_\_\_\_

  
Terry C. Copple, of the firm  
Attorneys for Plaintiff

STATE OF IDAHO )

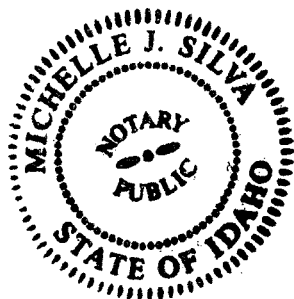
County of Ada )

**TERRY C. COPPLE**, being first duly sworn upon oath, deposes and says:

I am one of the attorneys for Plaintiff in the above-entitled action and, as such, I am better informed as to the items charged in the foregoing memorandum than the Plaintiff. To the best of my knowledge and belief, the foregoing items are correct and have been necessarily incurred in this action and are in compliance with Rule 54 of the Idaho Rules of Civil Procedure.

**Terry C. Copple**

SUBSCRIBED AND SWORN TO BEFORE ME this 23 day of December, 2015.



Notary Public for Idaho

Residence:

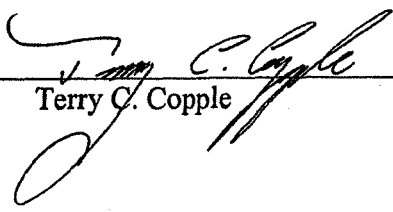
**Commission Expires:**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of December, 2015, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

☐ First Class, U.S. MAIL  
☐ Hand Delivery  
☒ Facsimile (208) 667-0500  
☐ Electronic Mail:  
john@magnusononline.com

  
\_\_\_\_\_  
Terry C. Copple

**FILED**

this 23 day of Dec.

2015 at \_\_\_ o'clock \_\_\_ m.

*[Signature]*  
Deputy Clerk

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
tc@davisoncopples.com  
band@davisoncopples.com

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by )  
merger to South Valley Bank & Trust, )  
Plaintiff, )

Case No. CV 2014 55

vs. )

AFFIDAVIT OF TERRY C. COPPLE IN  
SUPPORT OF MEMORANDUM OF  
COSTS AND ATTORNEYS' FEES

MICHAEL R. HULSEY, individually; SM )  
COMMERCIAL PROPERTIES, LLC, an )  
Idaho limited liability company; SILVER )  
MOUNTAIN CORPORATION, an Oregon )  
corporation; MORNING STAR LODGE )  
OWNERS ASSOCIATION, an Idaho non- )  
profit association; JOHN and JANE DOES I- )  
X; WHITE CORPORATIONS I-X, )

Defendants. )

\*\*\*

STATE OF IDAHO                    )  
                                          ss.  
County of Ada                    )

TERRY C. COPPLE, being first duly sworn on oath deposes and says:

I am one of the attorneys for Washington Federal in the above-entitled action and, as such, am better informed as to the items charged in the Memorandum Of Costs And Attorneys' Fees filed concurrently herewith than Washington Federal.

The attorneys' fees claimed in this matter are for the attorneys' fees after the Sheriff's sale of the units to Washington Federal to the conclusion of this matter but specifically excludes any attorneys' fees and costs relating to the issue of the fair market value of the collateral because neither party established the fair market value of the collateral units to the satisfaction of the Court.

To the best of my knowledge and belief, the items of costs and attorney fees stated in Exhibits "A" and "B" attached hereto and incorporated herein by reference, are correct and these costs and attorney fees are in compliance with Rule 54 of the Idaho Rules of Civil Procedure and were exceptional, necessary and reasonably incurred, and the interests of justice would best be served if these costs and attorney fees were paid by the Defendant Michael Hulsey in the above-entitled action. The attorneys' fees were also reasonably and necessarily incurred and are commensurate with fees charged by other attorneys in this area for litigation of this type.

---

~~The undersigned has taken into consideration in charging attorney fees the following:~~ 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law; 4) the prevailing charges for like work; 5) whether the fee is fixed or contingent; 6) the time limitations imposed by the client or the circumstances of the case; 7) the amount

involved and the results obtained; 8) the undesirability of the case; 9) the nature and length of the professional relationship with the client; 10) awards in similar cases; and 11) the reasonable costs of automatic legal research.

Each one of the foregoing factors support an award of attorneys' fees and costs to Washington Federal. The time and labor required was extensive especially with regard to the complex issues raised by Defendant Michael R. Hulsey in the bankruptcy proceedings consisting of his opposition to the motion to lift the automatic bankruptcy stay, the litigation over Michael R. Hulsey's Motion For Approval Of Adequate Protection Payments, Washington Federal's motion for a determination by the Bankruptcy Court that the bankruptcy was a single real estate asset case and on Washington Federal's motion to excuse compliance with 11 U.S.C. §543 so as to not be required to have the receiver turn over the rent to Defendant Michael R. Hulsey. Washington Federal prevailed on all of those issues. The novelty and difficulty of the questions required extensive briefing and preparation for the bankruptcy hearings on the foregoing issues. The skills requisite to perform the legal services required knowledge of not only real estate foreclosure law but also how to successfully handle a single asset real estate bankruptcy in the United States Bankruptcy Court for the District of Idaho. The prevailing charges for like work are very reasonable given the complexity and the high conflict nature of the litigation. The fee ~~was a fixed hourly fee and not contingent. The time limitations imposed by the client and the~~ circumstances of the case were such that the bankruptcy proceedings required immediate work and the filing of prompt motions in order to have the bankruptcy dismissed in record time by the Court. The undesirability of the case is not applicable to the current situation. Washington Federal has been represented by Terry C. Copple in the State of Idaho for a number of years and

an award of attorneys' fees in this case would be fair and reasonable as compared to other similar high conflict real estate foreclosure cases that have occurred since 2008.

Terry C. Copple's time was charged at \$245.00 per hour and was later increased to \$255.00 per hour in all of his matters. Michael Band's time was charged at \$160.00 per hour and was later increased to \$170.00 per hour in all of his matters.

Plaintiff Washington Federal is entitled to an award of attorney fees in accordance with the terms of the Promissory Note and Deed of Trust involved in this litigation, both of which are attached hereto as Exhibits "C" and "D." The attorneys' fees provision in the Promissory Note allows for an award of costs and attorneys' fees only for Washington Federal and not for the borrower, Michael R. Hulsey:

ATTORNEYS' FEES; EXPENSES. Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limited under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all sums provided by law.

Additionally, the attorneys' fees provision contained in the parties' Deed of Trust, dated August 30, 2005, reads similarly as follows:

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any ~~of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as~~ the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and



expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

As a result of the above provisions, the contract controls over I.R.C.P. 54(e) by virtue of I.R.C.P. 54(3)(8). *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009). Accordingly, Plaintiff Washington Federal is entitled to an award of its attorneys' fees and costs even if it was not a prevailing party. *Post v. Murphy*, 125 Idaho 473 (1994).

In any event, Plaintiff Washington Federal is the prevailing party in the above-entitled litigation because it prevailed on its relief for the appointment of a receiver as well as on its summary judgment resulting in the entry of the Judgment And Decree Of Foreclosure in the above-entitled litigation. Throughout the entire litigation, the foreclosure was vigorously contested by Defendant Michael R. Hulsey but he did not prevail on any of his issues he raised in the foreclosure.

Significantly, Plaintiff Washington Federal prevailed in its motion to have the bankruptcy stay lifted in Bankruptcy Court which was a highly contested matter regarding the fair market value of the Hulsey Units and whether the Defendant had any equity whatsoever in the units that ~~were the subject of the foreclosure. Multiple motions were filed by the parties and were litigated~~ in the Bankruptcy Court. Washington Federal prevailed on each and every one of those bankruptcy issues arising out of Washington Federal's Motion To Lift Stay, Objection To Borrower's Adequate Protection Motion, Washington Federal's motion for determination that the bankruptcy was a single real estate entity bankruptcy and on Washington Federal's request

for relief from having to turn over the Receiver's rental proceeds. It was critical in the bankruptcy proceedings that Washington Federal have the stay lifted as soon as possible in order to complete its foreclosure as well as to prevent Defendant Michael R. Hulsey from obtaining the rents during the pendency of the foreclosure. Washington Federal was successful on all of these motions. Defendant Michael R. Hulsey did not prevail on any of the contested issues in the Bankruptcy Court.

Although neither party prevailed on the issue of the value of the collateral before this Court at the trial, on all other issues in the litigation the Defendant did not prevail. Accordingly, Washington Federal is the overall prevailing party in this litigation in accordance with Rule 54(d)(1)(B) which reads as follows:

Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

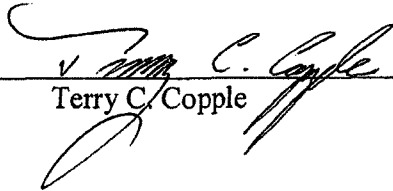
None of the attorneys' fees and costs claimed in the Memorandum Of Costs And Attorneys' Fees claim attorneys' fees and costs for the trial preparation and actual trial of the issue of the fair market value of the collateral heard by the Court.

---

As a result of Plaintiff Washington Federal being entitled to an award of fees and costs pursuant to its Promissory Note as well as prevailing in this action, it is entitled to an award of reasonable costs and attorney fees as outlined in this Affidavit pursuant to the Promissory Note and Deed of Trust.

Accordingly, we respectfully request the Court to award Plaintiff Washington Federal its total attorney fees and costs in the amount of \$28,176.61.

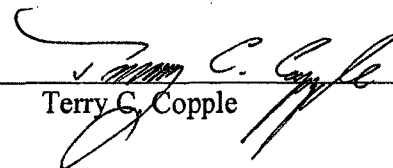
DATED this 23 day of December, 2015.

  
Terry C. Copple

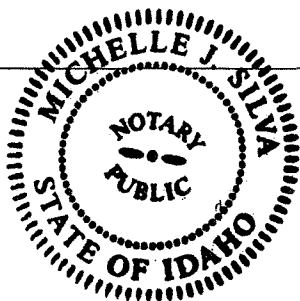
STATE OF IDAHO )  
                                  ss.  
County of Ada     )

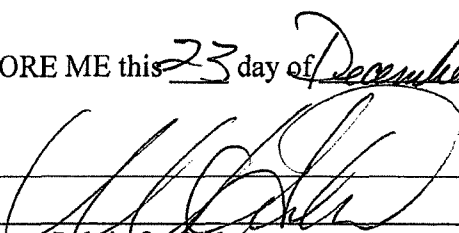
TERRY C. COPPLE, being first duly sworn upon oath, deposes and says:

I am one of the attorneys for Washington Federal in the above-entitled action and, as such, I am better informed as to the items charged in the foregoing memorandum than the Washington Federal. The foregoing items are correct and have been necessarily incurred in this action and are in compliance with Idaho Rule of Civil Procedure 54(d)(5).

  
Terry C. Copple

SUBSCRIBED AND SWORN TO BEFORE ME this 23 day of December, 2015.



  
Notary Public for Idaho  
Residence: Meridian, Idaho  
Commission Expires: 11-17-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of December 2015, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

☐ First Class, U.S. MAIL  
☐ Hand Delivery  
☒ Facsimile (208) 667-0500  
☐ Electronic Mail:  
john@magnusononline.com

  
Terry C. Copple

EXHIBIT "A"

**COSTS AS A MATTER OF RIGHT**  
**Pursuant to Idaho Rules of Civil Procedure Rule 54(d)(1)(C)**


SUBTOTAL

\$

**DISCRETIONARY COSTS**  
**Pursuant to Idaho Rules of Civil Procedure Rule 54(d)(1)(D)**

8/26/14	Recording fee – Judgment	28.00
8/26/14	Fee to issue Writ	2.00
9/3/14	Shoshone County Sheriff – foreclosure service fees	410.34
9/10/14	Recording fee – Writ	40.00
11/5/14	Bankruptcy Court Filing fee for Stay Lift Motion	176.00
1/5/15	Fee to issue Writ	2.00
1/5/15	Shoshone County Sheriff – foreclosure service fees for sale	540.00
2/23/15	Certified Mail – Sheriff	6.48
2/27/15	Shoshone County Sheriff – additional foreclosure service fees	227.79
3/5/15	Recording Fee – Certificate of Sale	13.00
9/9/15	Recording Fee – Sheriff's Deed	25.00

SUBTOTAL

\$1,470.61

**Total Costs:**

**\$1,470.61**

# EXHIBIT "B"

## ATTORNEYS' FEES Washington Federal

<u>Date</u>		<u>Hrs/Rate</u>	<u>Amount</u>
10/14/14	Draft and revise email correspondence to Washington Federal on approval of bid amount and various options thereon; Draft and revise bid letter to Sheriff on Washington Federal bid amount.	1.1 \$245.00/hr.	\$269.50
10/18/14	Legal research on issue of proper location for borrower to file for Chapter 11 protection in light of facts and federal bankruptcy law.	1.40 \$245.00/hr.	\$343.00
10/23/14	Telephone conference with Sheriff's Office on the upcoming sale of the property; Analyze and review procedure for sale and action to be taken after sale.	1.8 \$245.00/hr.	\$441.00
10/29/14	Telephone conference with Sheriff on receipt of credit bid and determine interest in the sale by third parties; Analyze and review Bankruptcy Court records in Oregon and Idaho to determine if LLC or the borrower has filed bankruptcy; Prepare letter on the sale by the Sheriff.	1.60 \$245.00/hr.	\$392.00
10/30/14	Analyze and review bankruptcy pleadings filed by opposing counsel on the issues of adequate protection during the bankruptcy; Analyze and review assets and values in bankruptcy schedules; Telephone call with Client on next steps to be taken in the case.	4.60 \$245.00/hr.	\$1,127.00
10/30/14	Legal research under bankruptcy code on procedures and substantive laws pertaining to relief from stay in light of the facts of the litigation.	2.10 \$160.00/hr.	\$336.00
10/30/14	Legal research on adequate protection, standards and case law in Idaho; Legal research on adequate protection specific to single asset real estate bankruptcy petitions; Legal research on use of previously assigned rents for adequate protection payments by debtor in single asset bankruptcy; Legal research on 9 <sup>th</sup> Circuit (and districts within) case law following rule set forth in In Re Buttermilk (6 <sup>th</sup> Cir) case prohibiting use of assigned rents for adequate protection payments in SARE case.	4.30 \$160.00/hr.	\$688.00
10/30/14	Legal research on all cases pertaining to adequate protection in 9 <sup>th</sup> Circuit, Idaho, U.S. Dist. of Idaho, and by Judge Terry Myers.	3.10 \$160.00/hr.	\$496.00
11/01/14	Analyze and review pleadings to be filed in opposition to pending motion for adequate protection; Prepare email correspondence to Washington Federal on hearing; Prepare email correspondence to Receiver and to appraiser on trial date in bankruptcy court.	4.10 \$245.00/hr.	\$1,004.50
11/01/14	Draft and revise affidavit of counsel in opposition to motion for payment of rents over to Debtor; Prepare motion for determination of single asset real estate; Legal research on the issue single asset real estate; Draft and revise initial draft of objection to Debtor's motion to use rents for payment to Washington Federal.	6.80 \$245.00/hr.	\$1,666.00

11/02/14	Legal research on issue of assignment of rents taking rents outside the jurisdiction of the bankruptcy court; Prepare amendments to objection to motion to pay rents; Organize exhibits for use with motion to file with Bankruptcy Court and evidentiary trial.	5.70 \$245.00/hr.	\$1,396.50
11/03/14	Draft and revise motion to lift stay to have the foreclosure removed from the Bankruptcy Court; Analyze and review stay lift laws as relates to stay lift for cause and special rules for a single real estate asset case; Further organize exhibits for use with the motion to lift stay; Legal research on the issue of combining the stay lift with the objection to the bankruptcy.	5.90 \$245.00/hr.	\$1,445.50
11/17/14	Represent Client in court on motion of borrower to obtain rents in bankruptcy from Receiver; Telephone call with opposing counsel prior to hearing on issues in the case; Final preparation of oral argument in the litigation; Telephone call with Washington Federal on the results of the court hearing.	3.8 \$245.00/hr.	\$931.00
12/01/14	Analyze and review affidavit of the Receiver in joinder in Section 543 request for excuse from rents going to debtor; Analyze and review brief filed by counsel for Receiver; Analyze and review affidavit of counsel for Receiver for allowing Receiver to remain in place.	2.20 \$245.00/hr.	\$539.00
12/01/14	Analyze and review objection filed by the US Trustee to the joinder by the Receiver in the pending motion to keep the Receiver in place; Draft and revise email correspondence to the Receiver's attorney on the objection; Outline response to the Receiver's joinder motion.	2.50 \$245.00/hr.	\$612.50
12/03/14	Draft and revise response to US Trustee's Objection to keeping Receiver in place during the bankruptcy; Telephone call with US Trustee to clarify Trustee's misunderstandings.	1.70 \$245.00/hr.	\$416.50
12/10/14	Prepare oral argument for upcoming four motions before the court; Telephone call with the Bankruptcy Court on the new hearing date; Prepare email correspondence to appraiser and Association attorney on need for their information for upcoming court hearing.	3.70 \$245.00/hr.	\$906.50
12/12/14	Analyze and review accounting filed by borrower as required by bankruptcy law; Analyze and review disclosure statement as to debtor's reasons on why Chapter 11 plan will work.	4.30 \$245.00/hr.	\$1,053.50
<del>12/14/14</del>	<del>Draft and revise objection to the disclosure statement filed by the Debtor because of multiple problems with the proposed plan and the disclosures. Analyze potential objection to Disclosure Statement in order to support rejection of plan.</del>	<del>5.8 \$245.00/hr.</del>	<del>\$1,421.00</del>
12/16/14	Preparation for tomorrow's court hearing on all four contested motions in the bankruptcy; Prepare updated oral argument outline for the Bankruptcy Court; Analyze and review additional affidavits filed by the Bankruptcy Trustee in support of remaining as trustee; Telephone call with Washington Federal on the upcoming hearings; Draft and revise email correspondence to attorney for the Receiver.	3.80 \$245.00/hr.	\$931.00

12/17/14	Represent Client in court on four motions to obtain a stay lift and on related issues; Telephone call with opposing counsel on the pending motions before the court; Final preparation for the court hearings.	4.90 \$245.00/hr.	1,200.50
12/04/14	Analyze and review accounting from Receiver on the finances of the Hulsey property; Telephone call with attorney for Receiver.	.90 \$245.00/hr.	\$220.50
12/19/14	Further analysis and review of grounds for objection to disclosure statement and plan.	2.80 \$245.00/hr.	\$686.00
12/19/14	Draft and revise order lifting the bankruptcy stay; Prepare order allowing Receiver to remain in possession of the rents and the property; Draft and revise order determining a SARE bankruptcy case; Prepare court order denying motion for approval of adequate protection payments.	2.70 \$245.00/hr.	\$661.50
01/02/15	Finalize sheriff sale pleadings to have the sheriff sale as soon as possible.	2.80 \$245.00/hr.	\$686.00
01/15/15	Draft and revise initial draft of memorandum of all attorneys' fees incurred since the entry of the foreclosure decree and incurred in the bankruptcy in order for those amounts to be paid by the borrower.	4.30 \$245.00/hr.	\$1,053.50
02/12/15	Draft and revise notice to court and the parties of the dismissal of the bankruptcy of SM Commercial.	.60 245.00/hr.	\$147.00
02/13/15	Analyze and review notice of sheriff sale for the public auction of the real property; Draft and revise letter to opposing counsel giving him notice of the Sheriff sale; Prepare email correspondence to Client on notice of Sheriff sale and status of case.	1.60 \$245.00/hr.	\$392.00
02/17/15	Telephone conference with Washington Federal on the bidding to be made at the upcoming sheriff sale; Analyze and review appraisal for the upcoming bidding at the sale; Draft and revise bid letter for the upcoming Sheriff sale; Telephone call with the Sheriff's office on the upcoming bidding at the Sheriff's sale.	2.80 \$245.00/hr.	\$686.00
02/23/15	Draft and revise updated bid letter to the Shoshone County Sheriff's office on bid amount; Telephone call with Washington Federal on the procedure for the bid amount; Analyze and review email correspondence from Washington Federal on the amount of the bid.	1.00 \$245.00/hr.	\$245.00
02/27/15	Draft and revise certificate of sale for real estate to be executed by the Sheriff for the buyer of the property at sheriff sale; Analyze and review letter from Sheriff on its requirements for the upcoming sale of the real estate at Sheriff's sale and comply with Sheriff requirements.	1.70 \$245.00/hr.	\$416.50
03/03/15	Telephone conference with Sheriff on the upcoming Sheriff sale; Draft and revise Sheriff's deed for the title being conveyed to Washington Federal; Telephone call with Washington Federal on the upcoming sale; Draft and revise changes to the Sheriff's Certificate for the sale for the title to be vested in the buyer.	2.90 \$245.00/hr.	\$710.50
03/05/15	Telephone conference with Sheriff's Office on the results of the sale; Prepare email correspondence to Washington Federal on the results of the sale; Draft and revise	1.40 \$245.00/hr.	\$343.00

EXHIBIT "B" - 4



	email correspondence to the appraiser on the results of the sale; Draft and revise email correspondence to Receiver attorney on the results of the sale of the property.		
03/06/15	Analyze and review Receiver's notice of intent to compensate.	.40 \$245.00/hr.	\$98.00
03/06/15	Draft and revise email correspondence to attorney for the Receiver on termination of the Receivership; Analyze and review order on how to terminate the receivership.	.90 \$245.00/hr.	\$220.50
03/07/15	Draft and revise motion for the termination of the receivership; Prepare affidavit of Washington Federal for the termination of the receivership; Draft and revise notice of hearing on the motion; Prepare email correspondence to the Receiver's attorney.	2.10 \$245.00/hr.	\$514.50
04/07/15	Draft and revise email correspondence to Washington Federal on HOA issues; Analyze and review March report and the final report of the Receiver as part of effort to close the foreclosure against the real property of the borrower.	1.80 \$245.00/hr.	\$441.00
04/08/15	Draft and revise order approving termination of receivership and approving of the accounts of the Receiver; Draft and revise email correspondence to attorney for receiver; Analyze and review court order appointing the receiver in order to obtain approval of all the accounts and actions of the receiver; Analyze and review affidavit of the receiver as part of effort to close the receivership.	2.10 \$245.00/hr.	\$514.50
04/09/15	Draft and revise discharge certificate for Receiver upon completion of duties; Draft and revise pleading filing draft order for the receivership.	1.10 \$245.00/hr.	\$269.50
04/11/15	Analyze and review objection to final accounting from Receiver and prepare remarks with regard thereto.	1.20 \$245.00/hr.	\$294.00
04/13/15	Represent Client before the District Court in support of entry of court order to allow final Receiver accounting; Final preparation of remarks to court on the hearing issues.	.90 \$245.00/hr.	\$220.50
05/12/15	Draft and revise final Receiver's Certificate ending the receivership.	1.10 \$245.00/hr.	\$269.50
	<b>SUBTOTAL</b>		<b>\$26,706.00</b>
	<b>TOTAL ATTORNEYS' FEES AND COSTS</b>		<b>\$28,176.61</b>

# PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No.	Call Coll.	Account	Office	Initial
\$1,350,000.00	08-30-2005	08-31-2015	830866448	REMOVED		SEN	2/15

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item.  
Any item above containing "\*\*\*\*" has been omitted due to text length limitations.

**Borrower:** Michael R. Hulseay (SSN: 555-62-0999)  
82200 Deer Trail Rd  
Bend, OR 97702

**Lender:** South Valley Bank & Trust  
Commercial Bend Branch  
572 SW Bluff Drive, Suite E  
Bend, OR 97702  
(541) 330-1894

**Principal Amount:** \$1,350,000.00

**Initial Rate:** 7.290%

**Date of Note:** August 30, 2005

**PROMISE TO PAY.** Michael R. Hulseay ("Borrower") promises to pay to South Valley Bank & Trust ("Lender"), or order, in lawful money of the United States of America, the principal amount of One Million Three Hundred Fifty Thousand & 00/100 Dollars (\$1,350,000.00), together with interest on the unpaid principal balance from August 30, 2005, until paid in full. The interest rate will not increase above 24.000%.

**PAYMENT.** Subject to any payment changes resulting from changes in the Index, Borrower will pay this loan in 118 regular payments of \$9,785.87 each and one irregular last payment estimated at \$1,080,319.01. Borrower's first payment is due October 1, 2005, and all subsequent payments are due on the same day of each month after that. Borrower's final payment will be due on September 1, 2015, and will be for all principal and all accrued interest not yet paid. Payments include principal and interest. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any unpaid collection costs; and then to any late charges. Interest on this Note is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate over the number of days in a year (365 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this Note is subject to change from time to time based on changes in an independent index which is the weekly average yield on United States Treasury Securities, Adjusted to a Constant Maturity of (3) Three Years: (the "Index"). The Index is not necessarily the lowest rate charged by Lender on its loans. If the Index becomes unavailable during the term of this loan, Lender may designate a substitute index after notice to Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each 3 Years. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 4.040% per annum. The interest rate to be applied to the unpaid principal balance of this Note will be at a rate of 3.250 percentage points over the Index, adjusted if necessary for any minimum and maximum rate limitations described below, resulting in an initial rate of 7.290% per annum. Notwithstanding the foregoing, the variable interest rate or rates provided for in this Note will be subject to the following minimum and maximum rates. **NOTICE:** Under no circumstances will the interest rate on this Note be less than 3.000% per annum or more than (except for any higher default rate shown below) the lesser of 24.000% per annum or the maximum rate allowed by applicable law. Notwithstanding the above provisions, the maximum increase or decrease in the interest rate at any one time on this loan will not exceed 10.000 percentage points. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original final maturity date, (B) increase Borrower's payments to cover accruing interest, (C) increase the number of Borrower's payments, and (D) continue Borrower's payments at the same amount and increase Borrower's final payment.

**PREPAYMENT.** Borrower agrees that all loan fees and other prepaid finance charges are earned fully as of the date of the loan and will not be subject to refund upon early payment (whether voluntary or as a result of default), except as otherwise required by law. Except for the foregoing, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full," "without recourse," or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: South Valley Bank & Trust, Commercial Bend Branch, 572 SW Bluff Drive, Suite E, Bend, OR 97702.

**LATE CHARGE.** If a payment is 15 days or more late, Borrower will be charged \$20.00.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, Lender, at its option, may, if permitted under applicable law, increase the variable interest rate on this Note to 24.000% per annum. The interest rate will not exceed the maximum rate permitted by applicable law.

**DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note:

**Payment Default.** Borrower fails to make any payment when due under this Note.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with any loan.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note for the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The death of Borrower or the dissolution or termination of Borrower's existence as a going business, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Foreclosure Proceedings.** Commencement of foreclosure or foreclosure proceedings, whether by judicial proceeding, self-help repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or foreclosure proceeding and if Borrower gives Lender written notice of the creditor or foreclosure proceeding and deposits with Lender monies or a surety bond for the creditor or foreclosure proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

**Insecurity.** Lender in good faith believes itself insecure.

**Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practicable.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance on this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

EXHIBIT "C"

1499

**PROMISSORY NOTE  
(Continued)**

Page 2

**GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Oregon without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Oregon.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$15.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

**COLLATERAL.** Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:

(A) a Deed of Trust dated August 30, 2005, to a trustee in favor of Lender on real property located in Shoshone County, State of Idaho.

(B) an Assignment of All Rents to Lender on real property located in Shoshone County, State of Idaho.

**SUCCESSOR INTERESTS.** The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

**NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CONSUMER REPORTING AGENCIES.** Please notify us if we report any inaccurate information about your account(s) to a consumer reporting agency. Your written notice describing the specific inaccuracy(ies) should be sent to us at the following address: South Valley Bank & Trust Consumer Branch P O Box 5210 Klamath Falls, OR 97601.

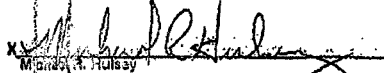
**GENERAL PROVISIONS.** Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

**UNDER OREGON LAW, MOST AGREEMENTS, PROMISES AND COMMITMENTS MADE BY US (LENDER) CONCERNING LOANS AND OTHER CREDIT EXTENSIONS WHICH ARE NOT FOR PERSONAL FAMILY OR HOUSEHOLD PURPOSES OR SECURED SOLELY BY THE BORROWER'S RESIDENCE MUST BE IN WRITING, EXPRESS CONSIDERATION AND BE SIGNED BY US TO BE ENFORCEABLE.**

**PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE NOTE.**

**BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.**

**BORROWER:**

  
Michael A. Hulsby

**RECORDATION REQUESTED BY:**

South Valley Bank & Trust  
Commercial Bend Branch  
672 SW Bluff Drive, Suite E  
Bend, OR 97702

**WHEN RECORDED MAIL TO:**

South Valley Bank & Trust  
Commercial Bend Branch  
672 SW Bluff Drive, Suite E  
Bend, OR 97702

**SEND TAX NOTICES TO:**

South Valley Bank & Trust  
Commercial Bend Branch  
672 SW Bluff Drive, Suite E  
Bend, OR 97702

425782

30404354

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

**DEED OF TRUST**

**MAXIMUM LIEN.** The lien of this Deed of Trust shall not exceed at any one time \$1,350,000.00.

**THIS DEED OF TRUST** is dated August 30, 2005, among Michael R. Hulsey ("Grantor"); South Valley Bank & Trust, whose address is Commercial Bend Branch, 672 SW Bluff Drive, Suite E, Bend, OR 97702 (referred to below sometimes as "Lender" and sometimes as "Beneficiary"); and Alliance Title & Escrow, whose address is 412 Cedar Street, Wallace, ID 83873 (referred to below as "Trustee").

**CONVEYANCE AND GRANT.** For valuable consideration, Grantor does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary, all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in Shoshone County, State of Idaho:

See Exhibit "A", which is attached to this Deed of Trust and made a part of this Deed of Trust as if fully set forth herein.

The Real Property or its address is commonly known as 602 Bunker Ave, Kellogg, ID 83873. The Real Property tax identification number is D0000062600.

Grantor presently assigns to Lender (also known as Beneficiary in this Deed of Trust) all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

**THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust, and the Related Documents.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property. The following provisions relate to the use of the Property or to other limitations on the Property. **THE REAL PROPERTY EITHER IS NOT MORE THAN FORTY (40) ACRES IN AREA OR IS LOCATED WITHIN AN INCORPORATED CITY OR VILLAGE.**

**Duty to Maintain.** Grantor shall maintain the Property in tenable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Compliance With Environmental Laws.** Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Deed of Trust. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any applicable law; and (2) agrees to indemnify and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Deed of Trust or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Deed of Trust, including the obligation to indemnify, shall survive the payment of the indebtedness and the satisfaction and reconveyance of the lien of this Deed of Trust and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any slipping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

**Removal of Improvements.** Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such improvements with Improvements of at least equal value.

**Lender's Right to Enter.** Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Deed of Trust.

**Compliance with Governmental Requirements.** Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in

EXHIBIT "D"

1501

DEED OF TRUST  
(Continued)

425782

Page 2

effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Duty to Protect.** Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are part of this Deed of Trust:

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, special taxes, assessments, charges (including water and sewer), fines and impositions levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of all liens having priority over or equal to the interest of Lender under this Deed of Trust, except for the lien of taxes and assessments not due and except as otherwise provided in this Deed of Trust.

**Right to Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien; or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes and assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialman's lien, or other lien could be asserted on account of the work, services, or materials and the cost exceeds \$1,000.00. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Deed of Trust:

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a fair value basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Trustee and Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption, and boiler insurance, as Lender may reasonably require. Policies shall be written in form, amounts, coverages and terms reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. The Real Property is or will be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area. Grantor agrees to obtain and maintain Federal Flood Insurance, if available, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property if the estimated cost of repair or replacement exceeds \$500.00. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or replacement. If Grantor is not in default under this Deed of Trust, any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Deed of Trust, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

**Grantor's Report on Insurance.** Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; and the then current replacement value of such property; and the manner of determining that value; and (5) the expiration date of the policy. Grantor shall, upon request of Lender, have an independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

**LENDER'S EXPENSES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Deed of Trust or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any obligations Grantor is required to discharge or pay under this Deed of Trust or any Related Documents, Lender on Grantor's behalf may but shall not be obligated to take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenses incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due after (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due at the maturity of the Note's maturity. The Deed of Trust also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

**WARRANTY OF TITLE.** The following provisions relating to ownership of the Property are a part of this Deed of Trust:

**Title.** Grantor warrants that (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances not of record as set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Deed of Trust, and (b) Grantor has the full right, power, and authority to execute and deliver this Deed of Trust to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Trustee or Lender under this Deed of Trust, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will reimburse Lender for such instruments and documentation as may be requested by Lender from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

**Survival of Representations and Warranties.** All representations, warranties, and agreements made by Grantor in this Deed of Trust shall survive the execution and delivery of this Deed of Trust, shall be continuing in nature, and shall remain in full force and effect until such time as the full indebtedness shall be paid in full.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Deed of Trust:

**Condemnation.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such action as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

DEED OF TRUST  
(Continued)

425782

Page 3

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness of the grantor or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Trustee or Lender in connection with the condemnation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Deed of Trust:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Deed of Trust and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Deed of Trust, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Deed of Trust.

**Taxes.** The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Deed of Trust or upon all or any part of the indebtedness secured by this Deed of Trust; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the indebtedness secured by this type of Deed of Trust; (3) a tax on this type of Deed of Trust chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Grantor.

**Subsequent Taxes.** If any tax to which this section applies is created subsequent to the date of this Deed of Trust, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Deed of Trust as a security agreement are a part of this Deed of Trust:

**Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Real and Personal Property. In addition to recording this Deed of Trust in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of the Deed of Trust as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

**Address.** The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Deed of Trust may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Deed of Trust.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Deed of Trust:

**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or re-recorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve: (1) Grantor's obligations under the Note, this Deed of Trust, and the Related Documents, and (2) the liens and security interests created by this Deed of Trust as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

**FULFILLMENT OF OBLIGATIONS.** If Grantor pays all the indebtedness when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Real and the Personal Property. Any reconveyance fee required by law shall be paid by Grantor, if permitted by applicable law.

**EVENTS OF DEFAULT.** Each of the following, at Lender's option, shall constitute an Event of Default under this Deed of Trust:

**Payment Default.** Grantor fails to make any payment when due under the indebtedness.

**Other Defaults.** Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Deed of Trust or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

**Compliance Default.** Failure to comply with any other term, obligation, covenant or condition contained in this Deed of Trust, the Note or in any of the Related Documents.

**Default on Other Payments.** Failure of Grantor within the time required by this Deed of Trust to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with the Property.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Deed of Trust or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any later date.

**Failure to Create Lien.** This Deed of Trust or any of the Related Documents ceases to be in full force and effect (including failure of any of the Related Documents to create a valid and perfected security interest or lien) at any time and for any reason.

**Bankruptcy and Insolvency.** The death of Grantor, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any petition filed for the bankruptcy of Grantor, any type of creditor action, or the commencement of any proceeding under any bankruptcy or insolvency law against Grantor.

**Receivership or Foreclosure Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, possession or any other method, by any creditor of Grantor or by any governmental agency against any property securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply unless it is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or foreclosure proceeding and Grantor gives Lender written notice of the creditor or foreclosure proceeding and deposits with Lender monies or a surety bond for the creditor or foreclosure proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Breach of Other Agreement.** Any breach by Grantor under the terms of any other agreement between Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor to Lender, whether existing now or later.

**Events Affecting Guaranty.** Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or fails to honor, any Guaranty of the indebtedness. In the event of a death, Lender, at its option, may, but shall not be required to, permit the guarantor or estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure

DEED OF TRUST  
(Continued)

425782

Page 4

any Event of Default.

**Adverse Change.** A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

**Insecurity.** Lender in good faith believes itself insecure.

**Right to Cure.** If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Deed of Trust within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default: (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**RIGHTS AND REMEDIES ON DEFAULT.** If an Event of Default occurs under this Deed of Trust, at any time thereafter, Trustee or Lender may exercise any one or more of the following rights and remedies:

**Notice of Default.** In the Event of Default Lender shall execute or cause the Trustee to execute a written notice of such default and of Lender's election to cause the Property to be sold to satisfy the Indebtedness, and shall cause such notice to be recorded in the office of the recorder of each county wherein the Real Property, or any part thereof, is situated.

**Election of Remedies.** Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Deed of Trust, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

**Accelerate Indebtedness.** Lender shall have the right at its option without notice to Grantor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay.

**Foreclosure.** With respect to all or any part of the Real Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**UCC Remedies.** With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

**Collect Rents.** Lender shall have the right, without notice to Grantor to take possession of and manage the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

**Appoint Receiver.** Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

**Tenancy at Sufferance.** If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

**Other Remedies.** Trustee or Lender shall have any other right or remedy provided in this Deed of Trust or the Note or by law.

**Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

**Sale of the Property.** To the extent permitted by applicable law, Grantor hereby waives any and all rights to have the Property marshaled, in applying the rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of this Property. Notice of sale having been given as then required by law and not less than the time required by law having elapsed, Trustee, without demand on Grantor, shall sell the Property at the time and place provided for in the notice of sale at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee shall deliver to the purchaser his or her deed conveying the Property so sold, but without any covenant or warranty express or implied. The results in such sales of any matters or facts shall be conclusive proof of the truthfulness of such matters or facts. After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable attorneys' fees, including those in connection with the sale, Trustee shall apply proceeds of sale to payment of: (a) all sums expended under this Deed of Trust, not then repaid with interest thereon as provided in this Deed of Trust; (b) all Indebtedness secured hereby; and (c) the remainder, if any, to the person or persons legally entitled thereto.

**Attorney's Fees Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is brought, and the extent to which the same is prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any applicable law, Lender's reasonable attorneys' fees and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or waive any automatic stay or injunction), appraisals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveys, reports and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**Rights of Trustee.** Trustee shall have all of the rights and duties of Lender as set forth in this section.

**POWERS AND OBLIGATIONS OF TRUSTEE.** The following provisions relating to the powers and obligations of Trustee are part of this Deed of Trust: Powers of Trustee. In addition to all powers of Trustee arising as a matter of law, Trustee shall have the power to take the following actions with respect to the Property upon the written request of Lender and Grantor: (a) join in preparing and filing a map or plat of the Real Property, in order to secure title, easements or other rights to the public; (b) join in granting any easement or creating any restriction on the Real Property; and (c) join in any substitution or other agreement affecting this Deed of Trust or the interest of Lender under this Deed of Trust.

**Obligations of Trustee.** Trustee shall not be obligated to notify any other party of a pending sale under any other trust deed or lien, or of any action or proceeding in which Grantor, Lender, or Trustee shall be a party, unless the action or proceeding is brought by Trustee.

**Trustee.** Trustee shall have the qualifications required for Trustee under applicable law. In addition to the rights and remedies set forth above, Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**Successor Trustee.** Lender, at Lender's option, may from time to time appoint a successor Trustee to any Trustee appointed under this Deed of Trust by an instrument executed and acknowledged by Lender and recorded in the office of the recorder of Shoshone County, State of Idaho. The instrument shall contain, in addition to all other matters required by state law, the names of the original Lender, Trustee, and Grantor, the book and page where this Deed of Trust is recorded, and the name and address of the successor trustee, and the instrument shall be executed and acknowledged by Lender or its successors in interest. The successor trustee, without conveyance of the Property, shall succeed to all the title, powers and duties conferred upon the Trustee in this Deed of Trust and by applicable law. This procedure for substitution of Trustee shall govern the substitution of all other provisions for substitution.

**NOTICES.** Any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be



DEED OF TRUST  
(Continued)

425782

Page 5

given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addressee shown near the beginning of this Deed of Trust. All copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust shall be sent to Lender's address, as shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Deed of Trust:

**Amendments.** This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Annual Reports.** If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

**Caption Headings.** Caption headings in this Deed of Trust are for convenience purposes only and are not to be used to interpret or define the provisions of this Deed of Trust.

**Merger.** There shall be no merger of the interest or estate created by this Deed of Trust with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Governing Law.** With respect to procedural matters related to the perfection and enforcement of Lender's rights against the Property, this Deed of Trust will be governed by federal law applicable to Lender and to the extent not preempted by federal law, the laws of the State of Oregon. In all other respects, this Deed of Trust will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Oregon without regard to its conflicts of law provisions. However, if there ever is a question about whether any provision of this Deed of Trust is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction that is evidenced by the Note and this Deed of Trust has been applied for, considered, approved and made, and all necessary loan documents have been accepted by Lender in the State of Oregon.

**No Waiver by Lender.** Lender shall not be deemed to have waived any right under this Deed of Trust unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Deed of Trust shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Deed of Trust. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Deed of Trust, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

**Severability.** If a court of competent jurisdiction finds any provision of this Deed of Trust to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Deed of Trust. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Deed of Trust shall not affect the legality, validity or enforceability of any other provision of this Deed of Trust.

**Successors and Assigns.** Subject to any limitations stated in this Deed of Trust on transfer of Grantor's interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Deed of Trust and the indebtedness by him, and the release or extinction of the obligations of this Deed of Trust or liability under the indebtedness.

**Waiver of the Statute of Limitations of the State of Oregon in the performance of this Deed of Trust.**

**Waiver of Homestead Exemption.** Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of Oregon and all indebtedness secured by this Deed of Trust.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Deed of Trust. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Deed of Trust shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Beneficiary.** The word "Beneficiary" means South Valley Bank & Trust, and its successors and assigns.

**Co-signer.** The word "Co-signer" means Michael R. Hulse and includes all co-signers and co-makers signing the Note.

**Deed of Trust.** The words "Deed of Trust" mean this Deed of Trust among Grantor, Lender, and Trustee, and includes without limitation all assignment and security interest provisions relating to the Personal Property and Rents.

**Default.** The word "Default" means the Default set forth in this Deed of Trust in the section titled "Default".

**Environmental Laws.** The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-469 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 49 U.S.C. Section 8501, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto or intended to protect human health or the environment.

**Event of Default.** The word "Event of Default" mean any of the events of default set forth in this Deed of Trust in the events of default section of this Deed of Trust.

**Grantor.** The word "Grantor" means Michael R. Hulse.

**Guaranty.** The word "Guaranty" means the guaranty from guarantor, endorser, surety, or accommodation party to Lender, including without limitation a guaranty of all or part of the Note.

**Hazardous Substances.** The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or biological characteristics may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

**Improvements.** The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

**Indebtedness.** The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust.

**Lender.** The word "Lender" means South Valley Bank & Trust, its successors and assigns.

**Note.** The word "Note" means the promissory note dated August 30, 2005, in the original principal amount of \$1,350,000.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement. The maturity date of this Deed of Trust is September 1, 2015. NOTICE TO GRANTOR: THE NOTE CONTAINS A



425782

**VARIABLES INTEREST RATE.**

**Property.** The word "Property" means collectively the Real Property and the Personal Property.

**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in this Deed of Trust.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

Trustee. The word "Trustee" means Alliance Title & Escrow, whose address is 412 Cedar Street, Wallace, ID 83873 and any substitute or successor trustee.

**GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS DEED OF TRUST, AND GRANTOR AGREES TO ITS TERMS.**

**GRANTOR:**

x Michael J. Huiey

## INDIVIDUAL ACKNOWLEDGMENT

STATE OF MISSISSIPPI

Country of: Switzerland

On this 10 day of August, in the year 2010, before me, John D. Hines, a notary public in and for the State of Idaho, personally appeared Michael R. Hulseley, known or identified to me (or proved to me on the oath of John D. Hines), to be the person whose name is subscribed to the within instrument and acknowledged to me that he or she executed the same.

**Notary Public for Idaho**

Residing at 1. 661

**My commission expires**

### REQUEST FOR FULL RECONVEYANCE

(To be used only when obligations have been paid in full)

To: \_\_\_\_\_, Trustee

**The undersigned is the legal owner and holder of all indebtedness secured by this Deed of Trust. All sums secured by this Deed of Trust have been fully paid and satisfied. You are hereby directed, upon payment to you of any sums owing to you under the terms of this Deed of Trust or pursuant to any applicable statute, to cancel the Note secured by this Deed of Trust (which is delivered to you together with this Deed of Trust), and to reconvey, without warranty, to the parties designated by the terms of this Deed of Trust, the estate now held by you under this Deed of Trust. Please mail the reconveyance and Related Documents to:**

**Dals:** \_\_\_\_\_

**Beneficiary:**

By: \_\_\_\_\_

Step: \_\_\_\_\_



**EXHIBIT "A"**

This EXHIBIT "A" is attached to and by this reference is made a part of the Deed of Trust, dated August 30, 2005, and executed in connection with a loan or other financial accommodations between SOUTH VALLEY BANK & TRUST and Michael R. Hulse.

Exhibit "A"

Commercial Unit No's 1, 2, 3, 4, 5, 6a, 6b and 7 of the Morning Star Lodge Condominium as shown and defined in the Condominium Declaration and Declaration of Covenants, Conditions and Restrictions for Morning Star Lodge Condominiums recorded February 10, 2005, Instrument No. 421817 in the Office of the County Recorder for Shoshone County, Idaho. Being all a portion of Parcel 1 of the Gondola Village-1 Minor Subdivision and being a portion of the Northwest quarter of Section 6, Township 48 North, Range 3 East, B.M., Shoshone County, State of Idaho.  
TOGETHER with any undivided interest in any common elements.

425702

Instrument # 425782  
WALLACE, SHOSHONE COUNTY, IDAHO  
2005-08-07 03:58:00 No. of Pages: 7  
Recorded for: ALLIANCE TITLE CO.  
PEGGY DELANCE-WHITE Fee: 21.00  
Ex-Officio Recorder: Deputy JS  
L. G. DEED OF TRUST

PM 3 59

*Shiner*

THIS EXHIBIT "A" IS EXECUTED ON AUGUST 30, 2005.

GRANTOR:

X *Michael R. Hulse*  
Michael R. Hulse

DEC 23 2015

TIME: 10:40 AM/PM  
Sara Jones  
DEPUTY CLERK

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055


**FINAL JUDGMENT**

**JUDGMENT IS ENTERED AS FOLLOWS:**

1. Plaintiff's claim for entry of a deficiency judgment against Defendant Michael R. Hulsey is dismissed with prejudice, and Plaintiff shall take nothing thereby.
2. All remaining claims at issue in the above-captioned matter are dismissed with prejudice and with Plaintiff taking nothing thereby.

3. An award of costs or attorney fees, if any, shall be determined in accordance with  
IRCP 54(d) and IRCP 54(e).

December  
ENTERED THIS 10 DAY OF NOVEMBER, 2015.

  
BENJAMIN R. SIMPSON  
Senior District Judge No. 101

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of November, 2015, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

John F. Magnuson - em  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814

☐ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE - 667-0500 -

Terry C. Copple - em  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

☐ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE - 208\386-9428 -

CLERK OF THE DISTRICT COURT

By:   
DEPUTY CLERK

HULSEY-WA FED-FINALJDG.wpd

FINAL JUDGMENT - PAGE 2

1509

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

FILED 12-31-15  
At 4:05 O'Clock AM PM

PEGGY WHITE, CLERK DISTRICT COURT  
Clerk of the District Court

By Macla Anson

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**MOTION FOR AWARD OF  
ATTORNEY FEES AND COSTS BY  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC**

COMENOW Defendants Hulsey and SM Commercial Properties, LLC, by and through their attorney of record, John F. Magnuson, and hereby move the Court for entry of an Order and Judgment awarding said Defendants their attorney fees as incurred in the defense of the remaining issue tried to the Court on September 22, 2015 (pursuant to the Court's August 18, 2014 Judgment and Decree of Foreclosure). Said award of fees and costs is made pursuant to Rule 54 of the Idaho

**MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY  
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, LLC - PAGE 1**


1510A

Rules of Civil Procedure and I.C. § 12-120(3).

This Motion is supported by the Memorandum of Costs and Attorney Fees and accompanying Affidavit of John F. Magnuson, both filed herewith, together with the files and records herein.

ORAL ARGUMENT IS REQUESTED on this Motion.

DATED this 29<sup>th</sup> day of December, 2015.


  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of December, 2015, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\386-9428

  
\_\_\_\_\_

HULSEY-WA FED-COST & FEES.MOT.wpd

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 DEC 31 PM 12:45

PEGGY WHITE  
CLERK DIST. COURT  
BY *Maia Anson*  
DEPUTY

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**MEMORANDUM OF COSTS AND  
ATTORNEY FEES ON BEHALF OF  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC**

Pursuant to IRCP 54 and I.C. § 12-120(3), Defendants Hulsey and SM Commercial  
Properties, LLC hereby submit and file the following Memorandum of Costs and Attorney Fees in  
the above-captioned matter:

**MEMORANDUM OF COSTS AND ATTORNEY FEES ON  
BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC - PAGE 1**

1510

## **I. PROCEDURAL BACKGROUND.**

1. On January 31, 2004, Plaintiff Washington Federal filed its “Verified Complaint and Application for Appointment of Receiver.” The Complaint sought entry of an Order appointing a receiver to take possession of the property at issue in this proceeding prior to any foreclosure on behalf of Washington Federal. The Complaint also sought an award of attorney fees under the “Loan Documents, Idaho Code § 12-120(3), and any other applicable law or rule . . . .”

2. On February 25, 2004, Washington Federal filed an “Amended Complaint.” The Amended Complaint restated Washington Federal’s claim for appointment of a receiver and added a claim for judicial foreclosure of Washington Federal’s Deed of Trust, as a mortgage, and for entry of a post-foreclosure deficiency judgment. Washington Federal restated its claim for attorney fees “pursuant to the Loan Documents, Idaho Code § 12-120(3), and any other applicable law or rule . . . .” See Amended Verified Complaint at p. 30, ¶ E.

3. On March 13, 2014, Defendants Hulsey and SM Commercial Properties executed a Stipulation, filed with the Court, agreeing to entry of an “Order Appointing Receiver.” On March 17, 2014, the Court entered the Stipulated “Order Appointing Receiver.”

4. On April 14, 2014, Washington Federal filed a “Second Amended Verified Complaint and Application for Appointment of Receiver.” The Second Amended Complaint restated Washington Federal’s claims for the appointment of a receiver, for foreclosure of the Deed of Trust as a mortgage, for entry of a deficiency judgment, and for an award of attorney fees “pursuant to the Loan Document, Idaho Code § 12-120(3), and any other applicable law or rule . . . .” See Second Amended Verified Complaint at p. 31, ¶ E.



5. On May 23, 2014, Defendants Hulsey and SM Commercial Properties answered Washington Federal's Second Amended Complaint. Said Defendants denied that Washington Federal was entitled to entry of any deficiency judgment. Defendants Hulsey and SM Commercial Properties also sought entry of an award of attorney fees "as provided by Idaho law, including but not limited to I.C. § 12-120(3)."

6. On July 3, 2014, Washington Federal moved for summary judgment. Washington Federal sought, among other things, entry of judgment in its favor "determining its entitlement to foreclose by judicial decree on its Deed of Trust secured against the commercial condominium units involved in this litigation." See Washington Federal's Brief in Support of Motion for Summary Judgment (filed July 3, 2014) at p. 6.

7. A Stipulation was filed with the Court on August 18, 2014, signed on behalf of Defendants Hulsey and SM Commercial Properties, stipulating to entry of a judgment and decree of foreclosure. On August 18, 2014, the stipulated "Judgment and Decree of Foreclosure" was entered. The stipulated Judgment was for the principal amount of \$1,487,517.62, including attorney fees and costs of \$66,183.95. See Judgment and Decree of Foreclosure (entered August 18, 2014) at p. 2, ¶ 1.

8. The Judgment and Decree of Foreclosure further provided:

That the Court specifically retains jurisdiction to determine the sole remaining issue after Sheriff's sale of the fair market value of the foregoing property as of the date of the foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a deficiency judgment against Defendant Michael R. Hulsey . . . .

Id. at p. 4, ¶ 9 (emphasis added).

9. On January 15, 2015, the Clerk endorsed a Writ of Execution, directing foreclosure of the subject property pursuant to the Court's "Judgment and Decree of Foreclosure." See Ex. 14.

10. On March 10, 2015, the Sheriff of Shoshone County endorsed a Certificate of Sale, evidencing that the property was foreclosed upon on March 5, 2015, and that Washington Federal acquired the property based upon a credit bid of \$765,000. See Ex. 18.

11. On September 22, 2015, the sole remaining issue, as identified in the Court's August 18, 2014 Judgment and Decree of Foreclosure, was tried. Following post-trial briefing, the Court entered its November 13, 2015 Memorandum Decision, finding that the Plaintiff had failed to meet its burden of proof as to the fair market value of the subject property on March 5, 2015 and that the Plaintiff had failed to prove the existence of a deficiency between the fair market value of the property on March 5, 2015 and Washington Federal's credit bid of \$765,000.

12. On December 23, 2015, the Court entered its Final Judgment, consistent with the Court's November 13, 2015 Memorandum Decision, reserving jurisdiction to determine an award of attorney fees or costs.

## **II. COSTS AND ATTORNEY'S FEES SOUGHT.**

Defendants Hulsey and SM Commercial Properties, LLC seek an award of attorney fees incurred in litigating the issue tried to the Court on September 22, 2015 (to-wit, whether Washington Federal was entitled to entry of a deficiency judgment). The Defendants seek no award of costs. Defendants only seek an award of attorney fees incurred after entry of the August 18, 2014 Judgment. Those attorney fees are described in more particularity with detail in the accompanying Affidavit of John F. Magnuson (filed herewith). The attorney fees sought by Defendants Hulsey and

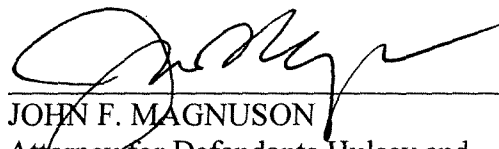
SM Commercial Properties total \$31,440.

### **III. RECAPITULATION.**

Set forth below is a recapitulation of the costs and attorney fees sought by Defendants Hulsey and SM Commercial Properties:

Costs Sought as a Matter of Right:	\$0.00
Costs Sought as a Matter of Discretion:	\$0.00
Attorney Fees Sought:	\$31,440.00
<b>TOTAL COSTS AND FEES SOUGHT:</b>	<b><u>\$31,440.00</u></b>

DATED this 29<sup>th</sup> day of December, 2015.

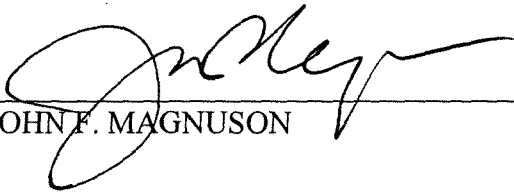
  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

STATE OF IDAHO            )  
                                      ) ss.  
COUNTY OF KOOTENAI    )

JOHN F. MAGNUSON, being first duly sworn, deposes and states:

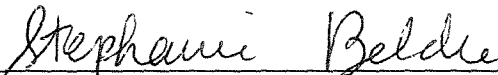
That I am the attorney of record for Defendants Hulsey and SM Commercial Properties, LLC in the above-captioned action and, as such, I am better informed as to the items charged in the foregoing Memorandum than Defendants Hulsey or SM Commercial Properties, LLC. To the best

of my knowledge and belief, the foregoing items are correct and have been necessarily incurred in this action and are in compliance with IRCP 54.

  
JOHN F. MAGNUSON

SUBSCRIBED AND SWORN to before me this 29<sup>th</sup> day of December, 2015.



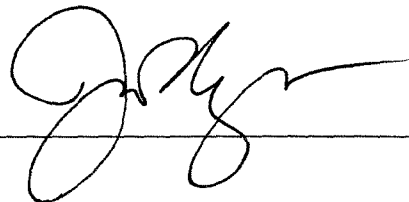
  
Notary Public in and for the State of Idaho  
Residing at: Coeur d'Alene  
My Commission Expires: 3/8/2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of December, 2015, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE - 208\386-9428



HULSEY-WA FED-COST & FEES.MEMO.wpd

MEMORANDUM OF COSTS AND ATTORNEY FEES ON  
BEHALF OF DEFENDANTS HULSEY AND SM COMMERCIAL  
PROPERTIES, LLC - PAGE 6

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 DEC 31 PM 12:59

PEGGY WHITE  
CLERK DIST. COURT  
BY *Michael R. Hulsey*  
DEPUTY

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**MOTION FOR AWARD OF  
ATTORNEY FEES AND COSTS BY  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC**

COME NOW Defendants Hulsey and SM Commercial Properties, LLC, by and through their attorney of record, John F. Magnuson, and hereby move the Court for entry of an Order and Judgment awarding said Defendants their attorney fees as incurred in the defense of the remaining issue tried to the Court on September 22, 2015 (pursuant to the Court's August 18, 2014 Judgment and Decree of Foreclosure). Said award of fees and costs is made pursuant to Rule 54 of the Idaho

**MOTION FOR AWARD OF ATTORNEY FEES AND COSTS BY  
DEFENDANTS HULSEY AND SM COMMERCIAL PROPERTIES, LLC - PAGE 1**


1516

Rules of Civil Procedure and I.C. § 12-120(3).

This Motion is supported by the Memorandum of Costs and Attorney Fees and accompanying Affidavit of John F. Magnuson, both filed herewith, together with the files and records herein.

ORAL ARGUMENT IS REQUESTED on this Motion.

DATED this 29<sup>th</sup> day of December, 2015.

  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of December, 2015, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
      HAND DELIVERED  
      OVERNIGHT MAIL  
  X   FACSIMILE - 208\386-9428

HULSEY-WA FED-COST & FEES.MOT.wpd

  
\_\_\_\_\_

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2015 DEC 31 PM 12:45

PEGGY WHITE  
CLERK DIST. COURT  
BY M. A. Anson  
DEPUTY

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**AFFIDAVIT OF JOHN F.  
MAGNUSON IN SUPPORT OF  
DEFENDANTS HULSEY AND SM  
COMMERCIAL, LLC'S  
MEMORANDUM OF COSTS AND  
ATTORNEY FEES AND MOTION  
FOR AWARD OF ATTORNEY FEES**

STATE OF IDAHO                    )  
                                          ) ss.  
COUNTY OF KOOTENAI    )

JOHN F. MAGNUSON, being first duly sworn, deposes and states:

1. That I am the attorney of record for Defendants Hulsey and SM Commercial  
Properties, LLC.

**AFFIDAVIT OF JOHN F. MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC's MEMORANDUM OF  
COSTS AND ATTORNEY FEES - PAGE 1**

2. I undertook the representation of said Defendants in this proceeding following the filing of Washington Federal's January 31, 2014 Complaint. My hourly rate in effect at that time for work of this nature was \$300.00. My hourly rate is currently \$325.00. However, I did not increase my hourly rate for these Defendants during the period of this litigation.

3. On August 18, 2014, the Court entered a stipulated "Judgment and Decree of Foreclosure." Pursuant to the terms of that Judgment, at Paragraph 9, the Court retained jurisdiction solely for purposes of determining whether or not Washington Federal was entitled to entry of a deficiency judgment following Washington Federal's foreclosure proceeding.

4. Washington Federal's Amended Complaint (filed February 25, 2014) and Second Amended Complaint (filed May 23, 2014) sought the following forms of relief: the appointment of a receiver; entry of a decree of foreclosure; entry of a deficiency judgment following foreclosure; and an award of attorney fees and costs pursuant to the Loan Documents and I.C. § 12-120(3).

5. Defendants Hulsey and SM Commercial Properties, LLC stipulated to entry of an order appointing a receiver.

6. Defendants Hulsey and SM Commercial Properties, LLC stipulated to entry of a Judgment and Decree of Foreclosure, without prejudice to their defense to any claim that Washington Federal asserted for entry of a deficiency judgment.

7. The time described in this Affidavit, and the accompanying Exhibit A, relates to action taken in the defense of Washington Federal's claim after entry of the August 18, 2014 stipulated "Judgment and Decree of Foreclosure." As set forth herein, I have expended 104.8 hours on behalf of the Defendants.



8. Attached hereto as Exhibit A, and incorporated by this reference, is an itemization of the specific time and tasks expended on behalf of the Defendants from August 18, 2014 through November 30, 2015. The hours detailed on Exhibit A hereto total 105.7. Two corrections to Exhibit A should be noted.

9. First, a total of 2.9 hours was incurred on August 18, 2014 and through August 21, 2014. This time related to the stipulated "Judgment and Decree of Foreclosure," and no recovery of the same is sought herein. Hence, the total time detailed in Exhibit A (105.7 hours) should be reduced by 2.9 hours to 102.8 hours.

10. Second, in preparing the submissions related to the Defendants' cost bill, and in reviewing the Plaintiff's cost bill submissions, I have expended additional time of 2 hours. Hence, the adjusted amount reflected in Exhibit A (102.8 hours) should be increased by 2 hours to a total of 104.8 hours.

11. 104.8 hours multiplied by my hourly rate of \$300.00 equates to a total fee award sought of \$31,440.00.

12. I believe in good faith, and therefore state, that the amount of fees claimed in the Defendants' Memorandum of Costs and Attorney Fees, and as itemized on Exhibit A hereto (as amended by this Affidavit), is reasonable given the factors set forth in IRCP 54(e)(3). A discussion of those factors in relation to the claims at issue in this proceeding is as follows:

- (A) The time and labor required: Please see the time detailed on Exhibit A hereto. Exhibit A details the actual time expended.
- (B) The novelty and difficulty of the question: This case was vigorously prosecuted by Washington Federal. Defendants Hulsey and SM Commercial Properties, LLC did not oppose entry of Washington Federal's requested

relief in the form of the appointment of a receiver or the entry of a Judgment and Decree of Foreclosure. No fee award is sought for any time involved in defending those claims and, in fact, Washington Federal has already received an award of attorney fees expended in the pursuit of those largely-unopposed claims. The factual background giving rise to the deficiency judgment issue, and the valuation considerations encompassed thereby, were vigorously contested and complex, requiring considerable time to analyze and distill the same so as to present a defense to the Court in an organized and concise manner.

- (C) The skill requisite to perform the legal services properly and the experience and ability of the attorney in the particular field of law: The undersigned believes he possesses the requisite skill to perform the legal services associated with the issues raised tried to the Court on September 22, 2015 (pursuant to the Court's August 18, 2014 Judgment and Decree of Foreclosure). The fees requested are reasonable for an experienced attorney in North Idaho and are less than the hourly rate currently charged others by your Affiant.
- (D) The prevailing charges for like work: The fees requested are within the range of fees in this geographic area for an attorney of like experience. Your Affiant has been licensed as an attorney in the State of Washington for twenty-seven (27) years and in the State of Idaho for twenty-four (24) years.
- (E) Whether the fee is fixed or contingent: Hourly basis.
- (F) Time limitations imposed by client or circumstances of this case: There were no unique time limitations imposed and the case proceeded on a normal time frame.
- (G) Defendants prevailed in their defense to Washington Federal's claim for entry of a deficiency judgment. The results on the sole claim tried to the Court on September 22, 2015 were entirely in the Defendants' favor.
- (H) Undesirability of case: None.
- (I) The nature and length of the professional relationship with the client: I have previously represented Defendants Hulsey and SM Commercial Properties, LLC in unrelated proceedings dealing with the property at issue in this proceeding (which involved issues with parties other than Washington Federal). Other than those matters of representation, in the two years

preceding the filing of this Complaint, I have no prior or ongoing relationship with said Defendants.

(J) Awards in similar cases: There was no award made in favor of the Plaintiff that was not otherwise by stipulation of the Defendants. The matter tried to the Court resulted in entry of a Judgment in favor of Defendants dismissing Washington Federal's claim with prejudice and with Washington Federal taking nothing thereby. Accordingly, Defendants obtained all of the relief they requested at trial.

(K) The reasonable cost of automated legal research: None sought.

13. Defendants Hulsey and SM Commercial Properties, LLC do not seek an award of costs (whether as of right or as of discretion).

14. Attorney fees requested by Defendants Hulsey and SM Commercial Properties, LLC are under the authority of I.C. § 12-120(3), as the gravamen of this dispute is a commercial transaction. In fact, Washington Federal filed a Complaint, An Amended Complaint, and a Second Amended Complaint, all of which acknowledged that the gravamen of the suit was a "commercial transaction" as Washington Federal itself asserted a claim for attorney fees under I.C. § 12-120(3).

15. Washington Federal has since caused to be filed an "Affidavit of Terry C. Copple in Support of Memorandum of Costs and Attorneys' Fees," dated December 23, 2015. In that Affidavit, Mr. Copple states: "[N]either party established the fair market value of the collateral units to the satisfaction of the Court." The burden of proof in establishing the fair market value of the collateral rested with the Plaintiff and the Court's Memorandum Decision of November 13, 2015 holds that the Plaintiff failed to meet its burden of proof. Hence, there can be no question that Defendants "prevailed" for purposes of trial on the sole issue reserved under the Court's August 18, 2014 Judgment and Decree of Foreclosure.

16. In the same Affidavit, Mr. Copple states:

In any event, Plaintiff Washington Federal is the prevailing party in the above-entitled litigation because it prevailed on its relief for the appointment of a receiver as well as on its summary judgment resulting in the entry of the Judgment and Decree of Foreclosure in the above-entitled litigation. Throughout the entire litigation, the foreclosure was vigorously contested by Defendant Michael R. Hulsey but he did not prevail on any of his issues he raised in the foreclosure.

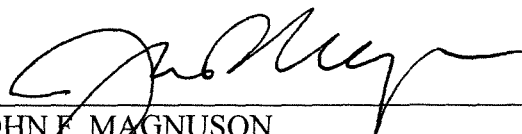
See Affidavit of Terry C. Copple in Support of Memorandum of Costs and Attorney Fees at p. 5. The foregoing statements are disingenuous at best.

17. Washington Federal did prevail on its request for the appointment of a receiver and for the entry of a Judgment and Decree of Foreclosure. Washington Federal prevailed on these claims because the Defendants stipulated to entry of the requested relief. Further, the stipulated Judgment and Decree of Foreclosure made an award of attorney fees to Washington Federal for the time expended from the filing of the Complaint through the entry of the Judgment.

18. Mr. Copple's statement that "the foreclosure was vigorously contested by Defendant Michael R. Hulsey" paints with an overly-broad brush. As noted, Defendants stipulated to the appointment of a receiver and to the entry of the Judgment and Decree of Foreclosure. That hardly constitutes a "vigorous contest." The Defendants did vigorously contest the entry of a deficiency judgment and, on that claim, they prevailed in total.

19. Your Affiant further states that the fees claimed herein are reasonable in light of the factors set forth in IRCP 54. Defendants request an award of attorney fees in the amount of \$31,440.00.


RESPECTFULLY REQUESTED this 29<sup>th</sup> day of December, 2015.

  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

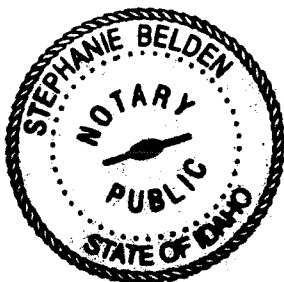
STATE OF IDAHO                    )  
                                                  ) ss.  
COUNTY OF KOOTENAI        )


JOHN F. MAGNUSON, being first duly sworn, deposes and states:

That I am the attorney of record for Defendants Hulsey and SM Commercial Properties, LLC in the above-captioned action and, as such, I am better informed as to the items charged in the accompanying Memorandum than my clients. To the best of my knowledge and belief, the foregoing items are correct and have been necessarily incurred in this action and are in compliance with IRCP 54(d) and 54 (e).

  
\_\_\_\_\_  
JOHN F. MAGNUSON

SUBSCRIBED AND SWORN to before me this 29<sup>th</sup> day of December, 2015.



  
\_\_\_\_\_  
Notary Public in and for the State of Idaho  
Residing at: Coeur d'Alene  
My Commission Expires: 3/8/2016

AFFIDAVIT OF JOHN F. MAGNUSON IN SUPPORT OF DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC's MEMORANDUM OF  
COSTS AND ATTORNEY FEES - PAGE 7

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of December, 2015, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple

Davison, Copple, Copple, & Copple, LLP

199 N. Capitol Blvd., Ste. 600

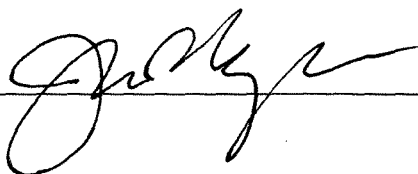
Boise, ID 83701

  X   U.S. MAIL

       HAND DELIVERED

       OVERNIGHT MAIL

  X   FACSIMILE - 208\386-9428



---

HULSEY-WA FED-COST & FEES.JFM.AFF.wpd

JOHN F. MAGNUSON  
ATTORNEY AT LAW  
P.O. BOX 2350  
COEUR D'ALENE, ID 83816

Invoice submitted to:  
Michael Hulsey  
P.O. Box 8600  
Bend, OR 97708

December 15, 2015

In Reference To: Washington Capital  
Fee Arrangement: \$300 Hour  
File No. 12-140

Professional Services

	<u>Hours</u>
8/18/2014 Letter to client, from counsel; letter re: case issues; calls re: same.	0.50
Prepare for hearing; argument motion; letter to client, counsel.	1.60
8/19/2014 Letter to/from client, court.	0.40
8/21/2014 Letter from court, to client.	0.40
8/22/2014 Letter re: case issues.	0.20
8/27/2014 Letter to counsel.	0.20
8/28/2014 Letter to client.	0.20
9/2/2014 Letter re: case issues.	0.20
9/4/2014 Draft motion, correspondence; letter to court, counsel, client.	0.60
9/8/2014 Letter to/from counsel.	0.20
9/10/2014 Draft pleadings, correspondence; revise motion.	0.70
9/11/2014 Letter to client, counsel.	0.20
9/15/2014 Conference with title company; draft pleading.	0.40
9/17/2014 Letter to/from client, counsel; letter to TC, client.	0.50

EXHIBIT A

1526

	<u>Hours</u>
9/22/2014 Letter from client, court.	0.20
9/23/2014 Letter to/from client.	0.20
9/25/2014 Letter to client, from court; analyze issues; conference with client; revise correspondence.	0.80
9/26/2014 Work on case issues; conference with client.	0.40
9/30/2014 Letter to/from client, counsel.	0.20
10/3/2014 Letter to Telephone conference with, client.	0.20
10/6/2014 Letter to/from counsel; conference with counsel.	0.40
10/8/2014 Letter to client, from counsel.	0.20
10/16/2014 Letter to/from counsel, client; conference with counsel; letter re: same.	0.50
10/20/2014 Letter from counsel.	0.20
10/21/2014 Letter re: issues.	0.20
10/23/2014 Letter to/from counsel.	0.30
10/24/2014 Letter to/from counsel, client.	0.20
11/3/2014 Letter to/from client, counsel; prepare for hearing; conference with court; letter re: same.	0.50
11/19/2014 Letter to/from counsel, client.	0.20
1/2/2015 Review multiple filings; letter re: same.	0.30
1/6/2015 Letter to counsel; draft discovery.	0.30
1/7/2015 Letter to/from counsel, client; review pleadings from counsel.	0.60
1/9/2015 Letter to/from counsel.	0.20
1/13/2015 Review appraisal info; draft responses to trial setting; conference with client.	0.70
1/14/2015 Work on case issues; letter from court.	0.50
1/15/2015 Letter to/from client, EM; letter re: case issues; draft discovery requests, correspondence.	0.80
1/19/2015 Letter from counsel; revise discovery.	0.40



	<u>Hours</u>
1/20/2015 Letter re: case issues.	0.20
1/21/2015 Work on case matters.	0.20
1/22/2015 Work on case matters.	0.20
1/23/2015 Letter from court, to counsel.	0.20
1/28/2015 Letter to/from counsel, client.	0.40
1/29/2015 Work on expert disclosures.	0.20
1/30/2015 Letter to court; letter from counsel.	0.30
2/2/2015 Letter to/from client.	0.20
2/3/2015 Work on discovery; correspondence re: same.	0.30
2/4/2015 Draft discovery; revise same.	0.50
2/5/2015 Work on discovery.	0.20
2/9/2015 Letter from court.	0.20
2/10/2015 Work on case issues; draft expert disclosures; letter re: same; letter to court.	0.80
2/11/2015 Work on case issues.	0.20
2/18/2015 Letter re: case issues.	0.20
2/19/2015 Letter from counsel, to client.	0.20
2/25/2015 Letter re: case issues.	0.20
3/10/2015 Letter from counsel; letter re: case issues.	0.40
3/13/2015 Letter to/from counsel.	0.20
3/17/2015 Letter to/from counsel, client, court.	0.30
3/19/2015 Call from court; letter to TC.	0.20
3/20/2015 Letter from court; call re: same.	0.20
3/25/2015 Letter to counsel, court.	0.20
3/26/2015 Letter re: case issues.	0.40
3/31/2015 Letter to TC, EM.	0.20

	<u>Hours</u>
4/1/2015 Multiple correspondence.	0.20
4/2/2015 Letter re: case issues.	0.20
4/10/2015 Draft objection; letter re: same.	0.30
4/13/2015 Letter re: case issues; prepare for and attend hearing re: receiver issues.	0.90
4/16/2015 Letter re: case issues.	0.20
4/20/2015 Draft stipulation, order, correspondence.	0.30
4/29/2015 Letter from counsel, to client; letter to court.	0.40
5/7/2015 Letter to/from EM.	0.20
5/8/2015 Draft discovery; meet with EM re: witness preparation; review Mundlin report; draft disclosures.	1.40
5/11/2015 Calls to/from Telephone conference with, EM.	0.20
5/13/2015 Letter from court.	0.20
5/27/2015 Letter re: case issues.	0.20
5/28/2015 Letter re: case issues.	0.20
5/29/2015 Letter to EM, client; letter from TC.	0.20
6/3/2015 Letter from counsel, to client.	0.20
6/22/2015 Prepare for deposition.	0.20
6/23/2015 Prepare for and attend EM depo.	2.40
6/26/2015 Letter to counsel, client.	0.20
7/2/2015 Letter to EM, TC, client.	0.20
7/6/2015 Letter re: case issues.	0.40
7/7/2015 Letter to/from counsel.	0.20
7/9/2015 Letter from court.	0.20
7/14/2015 Calls to/from counsel, client.	0.40
7/16/2015 Miscellaneous correspondence.	0.20

	<u>Hours</u>
7/27/2015 Letter re: case issues.	0.20
7/28/2015 Letter re: case issues.	0.20
7/30/2015 Correspondence re: case issues.	0.20
7/31/2015 Letter to/from counsel, EM, client.	0.20
8/17/2015 Prepare for status conference; review file; letter to/from counsel.	0.80
8/19/2015 Letter to/from counsel, client.	0.20
8/20/2015 Letter to/from TC, client, EM; letter re: case issues.	0.70
8/21/2015 Letter to/from TC; call client.	0.20
8/24/2015 Pretrial preparation.	0.20
8/25/2015 Letter from court.	0.20
8/28/2015 Letter to/from EM.	0.20
8/31/2015 Letter to/from client.	0.20
9/1/2015 Conference with EM.	0.20
9/2/2015 Letter from EM, to client, Copple; call from TC.	0.40
9/9/2015 Letter re: case issues; conference with court; letter to client.	0.50
9/10/2015 Work on exhibits, trial preparations, pretrial disclosures.	2.10
9/14/2015 Letter to TC.	0.20
9/15/2015 Work on case issues; prepare for trial; finalize conclusions; work on brief, findings; work with witness; multiple calls and correspondence.	4.60
9/16/2015 Letter to counsel; letter re: case issues; work on trial preparations; telephone call from court; letter to client; research.	0.60
9/17/2015 Work on pretrial motions, etc; research; correspondence re: same; amend exhibits; correspondence; revise pleadings; letter to counsel.	2.90
9/18/2015 Letter from counsel; prepare for trial; meet with witness; letter to client.	2.20

	<u>Hours</u>
9/20/2015 Work on trial preparations.	7.40
9/21/2015 Trial preparation.	6.20
9/22/2015 Prepare for trial.	7.10
9/23/2015 Prepare for and attend trial.	9.10
9/24/2015 Work on post trial brief.	1.10
9/25/2015 Work on brief; letter re: same; place calls.	1.70
9/28/2015 Work on brief.	0.20
9/29/2015 Work on brief.	0.20
9/30/2015 Letter to client.	0.20
10/1/2015 Work on brief.	0.20
10/2/2015 Work on brief.	0.20
10/5/2015 Draft brief.	4.50
10/6/2015 Work on post-trial brief.	5.80
10/7/2015 Draft brief; review record; review Plaintiff's brief.	3.40
10/12/2015 Draft reply brief, correspondence re: same; revise brief.	4.30
10/14/2015 Review reply brief.	0.30
10/19/2015 Draft motion, objection; letter re: same; review Wash Fed's reply brief.	0.80
10/20/2015 Review motion.	0.20
10/22/2015 Letter from TC; work on reply brief.	0.40
10/23/2015 Draft response to motion; correspondence re: same; letter to court.	0.50
10/26/2015 Letter to/from court.	0.20
11/3/2015 Letter re: case issues.	0.20
11/13/2015 Letter from court; conference with client; review decision; letter re: same; work on fee bill.	1.10
11/19/2015 Research re: fee issues.	0.30

1532

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN -5 PM 5:10

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

PEGGY WHITE  
CLERK DIST. COURT  
BY *[Signature]*  
DEPUTY

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**DEFENDANTS' OBJECTION AND  
MOTION TO DISALLOW RE:  
WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF  
ATTORNEYS' FEES AND COSTS**

COME NOW Defendants Michael R. Hulsey and SM Commercial Properties, LLC, by and through their attorney of record, John F. Magnuson, and hereby Object and Move to disallow Washington Federal's request for an award of attorneys' fees and costs (as contained in Washington Federal's "Motion for Award of Attorneys' Fees and Costs," dated December 23, 2015). This Objection and Motion to disallow is supported by the pleadings and submissions on file herein,

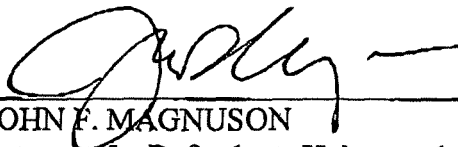
**DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE:  
WASHINGTON FEDERAL'S MOTION FOR AWARD OF  
ATTORNEYS' FEES AND COSTS BY -- PAGE 1**

including the following:

- (1) The Court's "Memorandum Decision" of November 13, 2015;
- (2) The Affidavit of John F. Magnuson (filed December 31, 2015);
- (3) The "Memorandum of Costs and Attorney Fees on Behalf of Defendants Hulsey and SM Commercial Properties, LLC" (filed December 31, 2015);  
and
- (4) The Memorandum submitted herewith.

ORAL ARGUMENT IS REQUESTED.

DATED this 5<sup>th</sup> day of January, 2016.

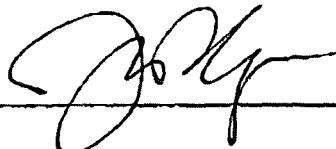
  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of January, 2016, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\386-9428

  
\_\_\_\_\_  
HULSEY-WA FED-COST & FEES.MOT.OBJ.wpd

DEFENDANTS' OBJECTION AND MOTION TO DISALLOW RE:  
WASHINGTON FEDERAL'S MOTION FOR AWARD OF  
ATTORNEYS' FEES AND COSTS BY -- PAGE 2

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN -8 PM 3:56

PEGGY WHITE  
CLERK DIST. COURT  
BY John F. Magnuson  
DEPUTY

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**MOTION TO STRIKE (FILED BY  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC)**

COME NOW Defendants Michael R. Hulsey and SM Commercial Properties, LLC, by and  
through their attorney of record, John F. Magnuson, and respectfully move the Court for entry of an  
Order striking certain inadmissible submissions filed on behalf of Washington Federal.

**MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC) -- PAGE 1**



**I. BRIEF OF WASHINGTON FEDERAL IN SUPPORT OF  
OBJECTION AND MOTION TO DISALLOW  
ATTORNEYS' FEES AND COSTS  
(DATED JANUARY 8, 2016).**

**1. Exhibit D to the Brief and Pages 10-11.**

Appended to Washington Federal's "Brief in Support of Objection and Motion to Disallow Attorneys' Fees and Costs" as Exhibit D is a copy of proposed trial Exhibit CC. That Exhibit was not admitted at trial. Washington Federal impermissibly seeks to introduce hearsay evidence, not admitted at trial, without foundation and after the taking of evidence has closed. Defendants object. The evidence constitutes hearsay and is inadmissible under IRE 802. Moreover, the Exhibit, in unsworn fashion as appended to the Brief, lacks foundation. Moreover, the taking of evidence closed on September 23, 2015 and Washington Federal had more than an ample opportunity before then to offer the proposed evidence that it now belatedly seeks to introduce after Judgment has been entered.

Pages 10-11 of the Brief, under Section 12, are likewise objectionable in that they reference and relate to proposed trial Exhibit CC (Exhibit D to the Brief).

**2. Settlement Discussions at Page 11 of the Brief and Exhibit E Thereto.**

Attached as Exhibit "E" to Washington Federal's Brief (dated January 8, 2016) is an unsworn e-mail exchanged in the context of settlement. Settlement discussions of this nature, in order to mischaracterize who "prevailed" in the deficiency judgment action, are otherwise inadmissible under IRE 408.<sup>1</sup>

---

<sup>1</sup>The Court should note that this is not the first time that Washington Federal has sought to prejudice Defendants by offering clearly inadmissible settlement negotiations. On March 10, 2014, Defendants Hulsey and SM Commercial Properties, LLC filed an Objection to Washington

Further, the discussion at Section 13 of page 11 of the Brief, which references the inadmissible settlement offer (Exhibit E to the Brief) should likewise be stricken. In the event the Court is going to consider the settlement offer, it should then also consider the position clearly communicated to Washington Federal and its counsel, by Defendant Hulsey, on July 17, 2014. See Affidavit of John F. Magnuson (filed herewith) at Exhibit A. Over a year before the trial on the deficiency judgment action, the Defendants proposed to give Washington Federal a deed in lieu of foreclosure, without the necessity of a Sheriff's sale, and with a waiver of all redemption rights. Washington Federal refused and should not now be heard to complain that its chosen course of conduct caused Washington Federal to incur liability for the fees incurred by Defendants, as the prevailing party, in matters tried to the Court.

**3. Section VI, PP. 11-12 of Washington Federal's Brief.**

At pages 11 and 12 (Section VI) of Washington Federal's Brief, Washington Federal again impermissibly cites to evidence not admitted at trial and otherwise constituting hearsay. The cited passages in Washington Federal's Brief should be stricken.

**4. Affidavit of Roy Cuzner (Dated January 8, 2016).**

**A. Paragraph 2, Page 2 of the Affidavit.**

At Paragraph 2 of Page 2 of the Cuzner Affidavit, Mr. Cuzner relates the substance of settlement discussions and also references valuation evidence not introduced at trial. The entire paragraph should be stricken in that it presents inadmissible evidence in the form of hearsay and

---

Federal's prior efforts to place inadmissible settlement communications in the Court file. At trial, Washington Federal again offered evidence of the same communications which the Court found to have been made in the context of "settlement negotiations" and not "credible evidence of fair market value." See Memorandum Decision (entered November 13, 2015) at p. 7.

settlement discussions. See IRE 408 and 802.

B. Exhibit D to the Cuzner Affidavit.

Exhibit D to the Cuzner Affidavit is another attempt by Washington Federal to introduce evidence (Defendants' proposed Exhibit CC) which was not admitted at trial. The evidence constitutes hearsay, lacks foundation, and is otherwise inadmissible since the taking of evidence has closed.

C. Cuzner Affidavit at Exhibit E.

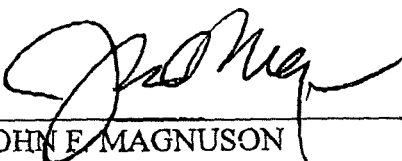
Exhibit E to the Cuzner Affidavit is a settlement communication and is otherwise inadmissible under IRE 408.

**II. CONCLUSION.**

Based upon the reasons and authorities set forth above, the cited provisions of Washington Federal's Brief (dated January 8, 2016) and the accompanying Affidavit of Roy Cuzner (also dated January 8, 2016) should be stricken.

ORAL ARGUMENT IS REQUESTED.

DATED this 8<sup>th</sup> day of January, 2016.

  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF

OF THE STATE OF IDAHO, IN AND FOR THE

FILED Jan. 5, 2016  
At 4:36 O'Clock AM PM

PEGGY WHITE, CLERK DISTRICT COURT  
Clerk of the District Court

By M. Anderson

*Need to integrate  
this into the  
record,*

DISTRICT

IDAHO

WASHINGTON FEDERAL, successor by )  
merger to South Valley Bank & Trust, )

Plaintiff, )

vs. )

MICHAEL R. HULSEY, individually; SM )  
COMMERCIAL PROPERTIES, LLC, an )  
Idaho limited liability company; SILVER )  
MOUNTAIN CORPORATION, an Oregon )  
corporation; MORNING STAR LODGE )  
OWNERS ASSOCIATION, an Idaho non- )  
profit association; JOHN and JANE DOES I- )  
X; WHITE CORPORATIONS I-X, )

Defendants. )

Case No. CV 2014 55

WASHINGTON FEDERAL'S MOTION  
FOR AWARD OF ATTORNEYS' FEES  
AND COSTS

\*\*\*

COMES NOW Plaintiff Washington Federal by and through its attorney of record, Terry

C. Copple of the firm Davison, Copple, Copple & Copple, LLP, of Boise, Idaho, and hereby

WASHINGTON FEDERAL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS - 1

1537 A

moves the Court to issue its Order awarding Plaintiff Washington Federal its accrued attorneys' fees and costs as set forth in its Memorandum Of Costs And Attorneys' Fees and the Affidavit Of Terry C. Copple In Support Of Memorandum Of Costs And Attorneys' Fees, pursuant to Rule 54 of the Idaho Rules of Civil Procedure, the parties' Promissory Note, Deed Of Trust and related loan documentation.

This Motion is made and based on the records and files herein. Oral argument is requested on this Motion.

DATED this 23<sup>RD</sup> day of December, 2015.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: FLR

  
Terry C. Copple of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of December, 2015, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
Michelle Silva

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

STATE OF IDAHO  
COUNTY OF SHOSHONE

FILED  
this 5 day of Jan.  
2016 at 5:10 o'clock p.m.  
Jara Jones  
Deputy Clerk

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an Idaho  
limited liability company; JOHN and JANE  
DOES I-X; and WHITE CORPORATIONS I-  
X,

Defendants.

NO. CV-14-055

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' OBJECTION AND  
MOTION TO DISALLOW RE:  
WASHINGTON FEDERAL'S MOTION  
FOR AWARD OF ATTORNEYS' FEES  
AND COSTS

COME NOW Defendants Michael R. Hulsey and SM Commercial Properties, LLC, by and through their attorney of record, John F. Magnuson, and respectfully submit this Memorandum in support of their Objection and Motion to disallow Washington Federal's request for an award of attorneys' fees and costs.

**I. PROCEDURAL BACKGROUND.**

1. On January 31, 2004, Plaintiff Washington Federal filed its "Verified Complaint and Application for Appointment of Receiver." The Complaint sought entry of an Order appointing a receiver to take possession of the property at issue in this proceeding prior to any foreclosure on behalf of Washington

MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION  
AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY -- PAGE 1

1537 B

Federal. The Complaint also sought an award of attorney fees under the "Loan Documents, Idaho Code § 12-120(3), and any other applicable law or rule . . . ."

2. On February 25, 2004, Washington Federal filed an "Amended Complaint." The Amended Complaint restated Washington Federal's claim for appointment of a receiver and added a claim for judicial foreclosure of Washington Federal's Deed of Trust, as a mortgage, and for entry of a post-foreclosure deficiency judgment. Washington Federal restated a claim for attorney fees "pursuant to the Loan Documents, Idaho Code § 12-120(3), and any other applicable law or rule . . . ." See Amended Verified Complaint at p. 30, ¶ E.

3. On March 13, 2014, Defendants Hulsey and SM Commercial Properties executed a Stipulation, filed with the Court, agreeing to entry of an "Order Appointing Receiver." On March 17, 2014, the Court entered the Stipulated "Order Appointing Receiver."

4. On April 14, 2014, Washington Federal filed a "Second Amended Verified Complaint and Application for Appointment of Receiver." The Second Amended Complaint restated Washington Federal's claims for the appointment of a receiver, for foreclosure of the Deed of Trust as a mortgage, for entry of a deficiency judgment, and for an award of attorney fees "pursuant to the Loan Document, Idaho Code § 12-120(3), and any other applicable law or rule . . . ." See Second Amended Verified Complaint at p. 31, ¶ E.

5. On May 23, 2014, Defendants Hulsey and SM Commercial Properties answered Washington Federal's Second Amended Complaint. Said Defendants denied that Washington Federal was entitled to entry of any deficiency judgment. Defendants Hulsey and SM Commercial Properties also sought entry of an award of attorney fees "as provided by Idaho law, including but not limited to I.C. § 12-120(3)."

6. On July 3, 2014, Washington Federal moved for summary judgment. Washington Federal sought, among other things, entry of judgment in its favor "determining its entitlement to foreclose by judicial decree on its Deed of Trust secured against the commercial condominium units involved in this



litigation.” See Washington Federal’s Brief in Support of Motion for Summary Judgment (filed July 3, 2014) at p. 6.

7. A Stipulation was filed with the Court on August 18, 2014, prepared by Washington Federal and signed on behalf of Defendants Hulsey and SM Commercial Properties, stipulating to entry of a judgment and decree of foreclosure. On August 18, 2014, the stipulated “Judgment and Decree of Foreclosure” was entered. The stipulated Judgment was for the principal amount of \$1,487,517.62, including attorney fees and costs of \$66,183.95. See Judgment and Decree of Foreclosure (entered August 18, 2014) at p. 2, ¶ 1. The stipulated Judgment also included the sum of \$5,761.73 as “the expenses of foreclosure.” Id.

8. The Judgment and Decree of Foreclosure further provided:

That the Court specifically retains jurisdiction to determine the sole remaining issue after Sheriff’s sale of the fair market value of the foregoing property as of the date of the foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a deficiency judgment against Defendant Michael R. Hulsey . . . .

Id. at p. 4, ¶ 9 (emphasis added).

9. The stipulated Judgment and Decree of Foreclosure contained an award of all attorney fees incurred through the date of entry (August 18, 2014), whether under the Loan Documents or I.C. § 12-120(3). The Judgment and Decree of Foreclosure was certified as final under IRCP 54(b). The time for appealing by either party has passed and the Judgment is now final.

10. On October 29, 2014, Defendant SM Commercial Properties, LLC filed a Voluntary Petition for Relief under Chapter 11 of the U.S. Bankruptcy Code. See Ex. 3. Defendant Hulsey has not filed (nor has he ever filed) a Petition for Relief under the U.S. Bankruptcy Code.

11. Washington Federal moved for relief from the automatic stay in the Chapter 11 proceeding filed by SM Commercial Properties, LLC. See Ex. 5. Said Motion, filed November 5, 2014, came on for

hearing before the Honorable Terry L. Myers, Chief Judge of the U.S. Bankruptcy Court, on December 18, 2014. See Ex. 7.

12. On December 22, 2014, Chief Judge Myers entered the Court's "Order Granting Motion for Relief from Automatic Stay." See Ex. 8.

13. On February 9, 2015, the Chapter 11 proceeding of SM Commercial Properties, LLC was dismissed by order of the Court. See Ex. 11.

14. Washington Federal made no request for an award of fees, timely or otherwise, in proceedings before the U.S. Bankruptcy Court. See Ex. 3.

15. On March 10, 2015, the Sheriff of Shoshone County endorsed a Certificate of Sale, evidencing that the property was foreclosed upon on March 5, 2015, and that Washington Federal acquired the property based upon a credit bid of \$765,000. See Ex. 18.

16. On September 22, 2015, the sole remaining issue, as identified in the Court's August 18, 2014 Judgment and Decree of Foreclosure, was tried. Following post-trial briefing, the Court entered its November 13, 2015 Memorandum Decision, finding that the Plaintiff had failed to meet its burden of proof as to the fair market value of the subject property on March 5, 2015 and that the Plaintiff had failed to prove the existence of a deficiency between the fair market value of the property on March 5, 2015 and Washington Federal's credit bid of \$765,000.

17. On December 23, 2015, the Court entered its Final Judgment, consistent with the Court's November 13, 2015 Memorandum Decision, reserving jurisdiction to determine an award of attorney fees or costs.

## **II. ARGUMENT.**

### **A. Defendants Were the Prevailing Parties on the Sole Claim (Washington Federal's Claim for Entry of a Deficiency Judgment) Tried to the Court on September 22, 2015.**

Pursuant to the terms of the stipulated "Judgment and Decree of Foreclosure," the Court retained jurisdiction "to determine the sole remaining issue after Sheriff's sale of the fair market value of the foregoing property as of the date of the foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a deficiency judgment against Defendant Michael R. Hulsey . . ." (emphasis added).

Following trial, this Court found as follows:

The Court finds the Plaintiff has failed to meet its burden of proof as to the fair market value of the subject real property on March 5, 2015. Further, the Court finds Plaintiff has failed to prove the existence of a deficiency between the fair market value of the property on March 5, 2015 and its credit bid of \$765,000.

See Memorandum Decision (entered November 13, 2015) at p. 14.

It is simply specious for Washington Federal to suggest to this Court that "neither party prevailed on the issue of the value of the collateral before [the] Court at the trial. . ." See Affidavit of Terry C. Copple (dated December 23, 2015) at p. 6. The singular issue tried to the Court on September 22 was determined adversely to Washington Federal. Washington Federal did not prevail in any way, shape, or form as to the issue tried on September 22, 2015.

Washington Federal further suggests:

Although neither party prevailed on the issue of the value of the collateral before this Court at the trial, on all other issues in the litigation, the Defendant did not prevail. Accordingly, Washington Federal is the overall prevailing party in this litigation in accordance with Rule 54(d)(1)(B). . . .

Id. at p. 6. Washington Federal fails to note that Defendants stipulated to entry of an Order appointing a receiver and stipulated to entry of the Judgment and Decree of Foreclosure. Further, Washington Federal fails to note that it already received an award of attorney fees and costs (\$66,183.95) and an award of expenses of foreclosure of \$5,761.73. Those claims were determined with finality, no appeal was taken, and Washington Federal fully recovered as "the prevailing party."

MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION  
AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY -- PAGE 5

1537B

With respect to the deficiency judgment claim, that claim was specifically retained as the only claim at the request of Washington Federal, and the prevailing party was undoubtedly the Defendants. Washington Federal has simply shown no cogent factual or legal argument in support of its claim that it prevailed at trial on September 22, 2015. Under Idaho law, a non-prevailing party has no right to recover costs or attorney fees from the plaintiffs. See, e.g., Hackett v. Street, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985). See also Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 117 P.3d 130 (2005).

**B. The Attorney Fees for Which Washington Federal Seeks Recovery Were Not Incurred in this "Action."**

Under IRCP 54(d)(1)(B), a prevailing "party to an action" is entitled to costs. The fees for which Washington Federal seeks recovery were not incurred in this "action."

All claims asserted by Washington Federal in this proceeding, save and except for the deficiency judgment claim, were fully and finally adjudicated, with an award of fees and costs to Washington Federal, and no appeal was taken. The fees which Washington Federal now seeks to recover from Hulsey were nearly all incurred in conjunction with bankruptcy proceedings filed by SM Commercial Properties, LLC.

Washington Federal prevailed in obtaining relief from the automatic stay with respect to SM Commercial Properties' Chapter 11 proceeding. If Washington Federal had a fee claim arising out of that proceeding, it should have asserted that claim before the U.S. Bankruptcy Court. It did not. Further, based upon the rationale now urged by Washington Federal (that it is entitled to recover fees under the terms of the Loan Documents), then Washington Federal should have asked the Bankruptcy Court for an award of attorney fees incurred by Washington Federal in successfully obtaining an order of relief from the automatic stay. It did not.

Nearly all of the fees for which Washington Federal now seeks recovery had nothing to do with the trial of the deficiency judgment claim. In fact, Mr. Copple notes in his Affidavit:

None of the attorneys' fees and costs claimed in the Memorandum of Costs and Attorneys' Fees claim attorneys' fees and costs for the trial preparation and actual trial of the issue of the fair market value of the collateral heard by the Court.  
See Affidavit of Terry C. Copple (dated December 23, 2015) at p. 6.

Given that Washington Federal has admitted that the fees and costs for which it seeks recovery have nothing to do with the "sole" remaining claim before the Court (by stipulation), and given that all remaining claims of Washington Federal other than the deficiency judgment claim were merged into the stipulated Judgment (prepared by Washington Federal), there is no legal basis upon which Washington Federal can recover the fees it seeks.

Put another way, Washington Federal did not retain a claim for breach of contract against the Defendants for causing Washington Federal to incur attorney fees and costs beyond those associated with the deficiency judgment claim. Washington Federal's Complaint, Amended Complaint, and Second Amended Complaint sought recovery of attorney fees as a prevailing party, not under some independent, stand-alone claim. Washington Federal obtained an award of attorney fees through the stipulated Judgment, and no appeal was filed. Based upon the clear language of the Judgment, the only basis upon which a further award of attorney fees could be made would be as an award to the prevailing party on the deficiency judgment claim. There is no dispute that Washington Federal did not prevail on that claim.

**C. No Award of Attorney Fees Against Hulsey is Proper.**

As set forth in the Copple Affidavit, nearly all of the fees claimed by Washington Federal were incurred in the context of SM Commercial Properties, LLC's Chapter 11 proceeding. Hulsey, individually, was not a party to those proceedings. Hence, even if Washington Federal somehow preserved a claim post-judgment for attorney fees incurred in contexts other than the deficiency judgment action, any such award could only be made against SM Commercial Properties, LLC.

**D. Washington Federal Failed to Preserve a Claim for Attorney Fees Incurred in Any Context Other than the Deficiency Judgment Action.**

Washington Federal drafted the Judgment and Decree of Foreclosure to which the parties stipulated. Washington Federal took great pains to specify in Paragraph 9 that "the sole remaining issue" was whether or not Hulsey was liable on a deficiency judgment. Washington Federal preserved no independent or stand-alone claim for fees incurred in any other context. To the extent any such claim existed, then by virtue of the clear language of the stipulated Judgment and Decree of Foreclosure, said claim merged into the unappealed final Judgment and is now barred.

**E. Washington Federal's Request for an Award of Costs Should Be Denied.**

Washington Federal's request for an award of costs should be denied on multiple bases. First, the only "costs" that are recoverable relate to the deficiency judgment action. All other costs either merged in the Judgment or were included in the amounts outstanding at the time of the Sheriff's sale. The Writ of Execution prepared by Washington Federal (Ex. 14) included the principal amount of the stipulated Judgment and Decree of Foreclosure, accrued interest, "plus accruing costs and Sheriff's fees." There are no costs sought by Washington Federal that relate to the deficiency judgment as opposed to the Decree of Foreclosure and the sale conducted thereunder.

Second, Washington Federal was not "the prevailing party" for purposes of the sole remaining claim (to-wit, the claim for entry of a deficiency judgment), and the claimed costs do not relate thereto.

Third, Washington Federal's claim for costs, to the extent not included in the sums under which the foreclosure took place, were waived or merged into the unappealed Judgment and Decree of Foreclosure.

**III. CONCLUSION.**

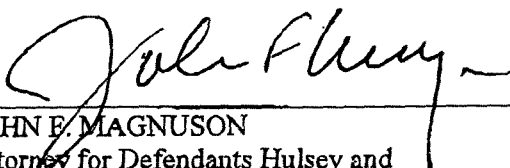
Washington Federal's claim for fees and costs should be denied for the following reasons:

- (1) The fees for which Washington Federal seeks recovery were not incurred in this action;
- (2) Washington Federal waived any request for fees incurred in the Bankruptcy Court proceedings by failing to make a request for an award of the same to the Bankruptcy Court;

- (3) There was no exhaustion of remedies by Washington Federal through a request for fees in the Bankruptcy Court;
- (4) SM Commercial Properties, LLC was the only party to the bankruptcy. Accordingly, an award of fees against Hulsey is inappropriate;
- (5) The attorney fees were incurred in proceedings other than the deficiency judgment action;
- (6) The attorney fees were not a preserved claim under the stipulated Judgment and Decree of Foreclosure;
- (7) Washington Federal was not the prevailing party on the deficiency judgment claim;
- (8) Washington Federal was already fully awarded all attorney fees related to the receivership and foreclosure claims;
- (9) There was no claim for fees under the Loan Documents that was preserved following entry of the unappealed Judgment on all remaining claims save and except for the deficiency judgment claim; and
- (10) Washington Federal's claim for fees under the Loan Documents, to the extent not encompassed by the deficiency judgment action, merged into the unappealed Judgment that Washington Federal drafted.

Defendants Hulsey and SM Commercial Properties, LLC request that Washington Federal's request for an award of attorney fees and costs be denied in its entirety and that said Defendants be awarded their costs and fees as set forth in their previously-filed "Memorandum of Fees and Costs" filed December 31, 2015.

DATED this 5<sup>th</sup> day of January, 2016.

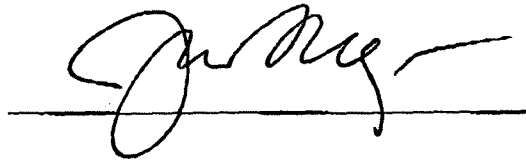
  
\_\_\_\_\_  
JOHN E. MAGNUSON  
Attorney for Defendants Hulsey and  
SM Commercial Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of January, 2016, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☒ FACSIMILE - 208386-9428



HULSEY-WA FED-COST & FEES.MOT.OBJ.BRF.wpd

MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION  
AND MOTION TO DISALLOW RE: WASHINGTON FEDERAL'S  
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY -- PAGE 10

1537 B



STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN -8 PM 3:56

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

PEGGY WHITE  
CLERK DIST. COURT  
BY *[Signature]*  
DEPUTY

Attorney for Defendants Michael R. Hulsey and  
SM Commercial Properties, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by  
merger to South Valley Bank & Trust,

Plaintiff,

vs.

MICHAEL R. HULSEY, individually; SM  
COMMERCIAL PROPERTIES, LLC, an  
Idaho limited liability company; JOHN and  
JANE DOES I-X; and WHITE  
CORPORATIONS I-X,

Defendants.

NO. CV-14-055

**DECLARATION OF JOHN F.  
MAGNUSON IN SUPPORT OF  
MOTION TO STRIKE (FILED BY  
DEFENDANTS HULSEY AND SM  
COMMERCIAL PROPERTIES, LLC)**

My name is JOHN F. MAGNUSON and I make this Declaration upon my own personal  
knowledge and belief.

1. I am the attorney of record for Defendants Hulsey and SM Commercial Properties,  
LLC.

DECLARATION OF JOHN F. MAGNUSON IN SUPPORT OF  
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC) -- PAGE 1

2. Attached hereto as Exhibit A is a true and correct copy of correspondence I sent to Terry Copple on July 17, 2014.

3. The proposal advanced in my July 17, 2014 letter to Mr. Copple (Exhibit A) was not accepted by Washington Federal.

I certify under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

DATED this 8<sup>th</sup> day of January, 2016.

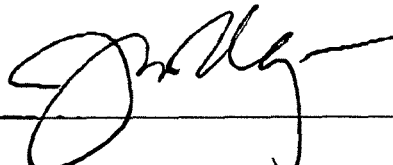
  
JOHN F. MAGNUSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of January, 2016, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple  
Davison, Copple, Copple, & Copple, LLP  
199 N. Capitol Blvd., Ste. 600  
Boise, ID 83701

  X   U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208386-9428



HULSEY-WA FED-STRIKE-JFM.DEC.wpd

DECLARATION OF JOHN F. MAGNUSON IN SUPPORT OF  
MOTION TO STRIKE (FILED BY DEFENDANTS HULSEY  
AND SM COMMERCIAL PROPERTIES, LLC) -- PAGE 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of January, 2016, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their name, either by mailing to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; by overnight mail; or by facsimile transmission.

Terry C. Copple

Davison, Copple, Copple, & Copple, LLP

199 N. Capitol Blvd., Ste. 600


Boise, ID 83701

  X   U.S. MAIL

       HAND DELIVERED

       OVERNIGHT MAIL

  X   FACSIMILE - 208\386-9428

  
\_\_\_\_\_

HULSEY-WA FED-STRIKE.MOT.wpd

JOHN F. MAGNUSON

ATTORNEY AT LAW

ADMITTED IN IDAHO AND WASHINGTON

TELEPHONE  
208-667-0100

FAX  
208-667-0500

P.O. Box 2350  
1250 NORTHWOOD CENTER COURT  
SUITE A  
COEUR D'ALENE  
IDAHO 83816

July 17, 2014

Terry C. Copple  
Davison, Copple, Copple & Copple, LLP  
199 N. Capitol Boulevard, #600  
P.O. Box 1583  
Boise, ID 83701

E-MAIL and FIRST-CLASS MAIL

Re: Washington Federal v. Hulsey  
Shoshone County Case No. CV-10-3457C

Dear Terry:

This letter addresses matters related to settlement and is governed by IRE 408.

Your motion for summary judgment is noted for hearing on August 18. Solely for purposes of settlement, and without acknowledging the bona fides of Washington Federal's position, please consider the following.

Your motion for summary judgment will likely be granted to the extent that there is an uncured default, there is a liquidated amount owing, and you have a right to foreclose. The Court will then allow you to proceed with the sale of the subject property. The Court will not determine the fair market value of the property in the context of your pending motion because that involves an issue of fact that must await further proceedings.

In the absence of some settlement arrangement, what could likely happen is the filing of a Petition for Relief under Chapter 11 by SM Commercial Properties, LLC. That would likely be filed on the eve of the sale in the event that a settlement cannot be reached. Neither Mr. Hulsey nor SM Commercial desire to be divested of the property in that it has considerable value to the prospective purchaser of the Resort and, fairly considered, that value to the prospective purchaser exceeds the amount of the debt. If the foreclosure happens before the sale of the Resort, then an artificial deficiency might be created. If the foreclosure happens after the sale of the Resort, then there may

EXHIBIT A

1540A

July 17, 2014

Page 2

well be no deficiency. Accordingly, because of the timing arising out of this proceeding, SM Commercial Properties, LLC may have no alternative other than to file a petition for relief under Chapter 11 on the eve of any court-ordered foreclosure sale.

Even if SM Commercial is unable to successfully reorganize, and should Washington Federal obtain relief from stay, there would by necessity, be added delay. Suppose the sale then went forward as ordered by the Court. Since this would be a judicial foreclosure, there would be a period of redemption, likely 12 months. As you are aware, that would effectively mean that the property would be foreclosed upon in four to six months and unmarketable for another 12 months after that. Simply put, in the absence of some settlement, and assuming conservative estimates of time, Washington Federal couldn't realize upon the sale of the subject property in any appreciable manner for 18 months. Further, this scenario presumes that Mr. Hulsey himself won't be pushed into a personal bankruptcy after a Chapter 11 filing by SM Commercial.

This doesn't even take into account the delays that would be occasioned on the ultimate resolution of the amount of a deficiency, if any. Simply put, if there was a petition for relief filed by SM Commercial under Chapter 11, on the eve of the foreclosure sale, and if Mr. Hulsey subsequently filed a petition under Chapter 7 (something he hopes to avoid), then the issue of deficiency would be rendered moot. The only thing certain is that Washington Federal would have property of questionable marketability and added cost and delay.

Please recognize that my client advances the foregoing information not as a threat of any kind but simply as a practical recognition of the place in which both he and SM Commercial Properties find themselves. To a large degree, they didn't create this problem. They took out a loan from South Valley Bank. They paid that loan at all points in time. Had Washington Federal simply extended the loan, the loan would still be current. This was tantamount to pulling a chair out from someone. In the absence of Washington Federal's declaration of default and filing of this proceeding, the note would still be being kept current while the market continues to heal. In that regard, the situation which Washington Federal finds itself is of its own choosing. We wish no ill will. Those are simply the facts.

As an alternative to further litigation, and in an effort to resolve all disputes by and between my clients, on the one hand, and Washington Federal and South Valley Bank, on the other hand, my clients will agree to execute a deed in lieu of foreclosure, in a form acceptable to your client, and to waive all redemption rights. This would be in full satisfaction of all claims, including any claim to a deficiency judgment.

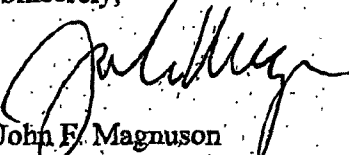
1540A

July 17, 2014

Page 3

This offer will remain open through July 25, 2014 at 12:00 p.m. Thank you.

Sincerely,



John F. Magnuson

JFM/km

cc: Clients

COFFL LTR4.wpd

1540A

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO  
AND FOR THE COUNTY OF SHOSHONE  
700 BANK STREET, SUITE 120  
WALLACE, IDAHO 83873

FILED 1/8/2016 AT 01:17 PM  
STATE OF IDAHO, COUNTY OF SHOSHONE SS  
CLERK OF THE DISTRICT COURT

BY Sara James DEPUTY

Washington Federal

vs.

Michael R Hulsey, etal.

)  
) Case No: CV-2014-0000055  
)

) **NOTICE OF HEARING**  
)

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

Motion

Re: Attorney Fees and Costs

Judge:

Courtroom:

Tuesday, March 15, 2016

Fred M. Gibler

District Court, 3<sup>rd</sup> Floor

01:00 PM

**Alternate Presiding Judges:** Benjamin Simpson; John P. Luster; John T. Mitchell; Fred M. Gibler; Steven Verby; Lansing Haynes; George Reinhardt, III; Barbara Buchanan; Charles W. Hosack; Richard Christensen; Cynthia Meyer

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on January 8th, 2016.

Terry Copple – Email

John F. Magnuson – Email

Judge Benjamin Simpson - email

Dated: January 8th, 2016

Peggy White

Clerk Of The District Court

By:

Sara James  
Deputy Clerk

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN 11 PM 3:52

PEGGY WHITE  
CLERK DIST. COURT  
BY [Signature]  
DEPUTY

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
tc@davisoncopples.com  
band@davisoncopples.com

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	WASHINGTON FEDERAL'S OBJECTION
vs.	)	AND MOTION TO DISALLOW
	)	ATTORNEYS' FEES AND COSTS
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	
	)	

\*\*\*

COMES NOW Plaintiff Washington Federal by and through its attorney of record, Terry  
C. Copple of the firm Davison, Copple, Copple & Copple, LLP, of Boise, Idaho, and hereby

WASHINGTON FEDERAL'S OBJECTION AND MOTION TO DISALLOW ATTORNEYS'  
FEES AND COSTS - 1

1542  
ORIGINAL



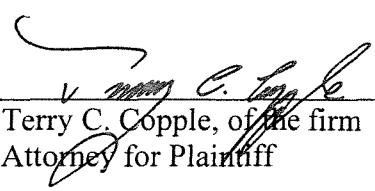
objects to the Memorandum Of Costs And Attorney Fees submitted by Defendant Michael R. Hulsey and SM Commercial Properties, LLC as well as their Motion For Award Of Attorney Fees And Costs dated December 29, 2015, and hereby moves this Court to enter its order disallowing all of the costs and attorneys' fees requested by the foregoing Defendants pursuant to Rule 54(d)(6) on the following grounds and reasons: (1) Defendants Michael R. Hulsey and SM Commercial Properties, LLC are not entitled to an award of attorneys' fees pursuant to the parties' Promissory Note; (2) Defendants are not the overall prevailing parties in the above-entitled litigation; (3) Plaintiff Washington Federal is entitled to an award of its costs and attorneys' fees in the above-entitled litigation and in addition, is the overall prevailing party in the litigation; (4) Defendants' claim for attorneys' fees and costs does not comply with the requirements of Rule 54 of the Idaho Rules of Civil Procedure; and (5) Defendants' amount of attorneys' fees and costs are excessive and were not reasonably and necessarily incurred.

This Motion is made and based on the records and files herein and the affidavit of Washington Federal and brief to be filed with the above-entitled Court. Oral argument is requested on this Objection And Motion.

DATED this 8 day of January, 2016.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_\_\_\_

  
Terry C. Copple, of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of January, 2016, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL  
☐ Hand Delivery  
☒ Facsimile (208) 667-0500  
☐ Electronic Mail: [john@magnusononline.com](mailto:john@magnusononline.com)

  
\_\_\_\_\_  
Terry C. Copple

2016 JAN 11 PM 3:53

PEGGY WHITE  
CLERK DIST. COURT  
BY Saragines  
DEPUTY

Attorneys for Plaintiff  
Washington Federal

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2010-3457C
	)	
Plaintiff,	)	
	)	AFFIDAVIT OF ROY CUZNER IN
vs.	)	SUPPORT OF WASHINGTON
	)	FEDERAL’S OBJECTION AND MOTION
MICHAEL R. HULSEY, individually; SM	)	TO DISALLOW ATTORNEYS’ FEES
COMMERCIAL PROPERTIES, LLC, an	)	AND COSTS
Idaho limited liability company; JOHN and	)	
JANE DOES I-X; WHITE	)	
CORPORATIONS I-X,	)	
	)	
Defendants.	)	
	)	

\* \* \*

STATE OF WASHINGTON )  
 ) ss.  
County of King )

AFFIDAVIT OF ROY CUZNER IN SUPPORT OF WASHINGTON FEDERAL'S OBJECTION AND MOTION  
TO DISALLOW ATTORNEYS' FEES AND COSTS - 1

1545  
ORIGINAL

ROY CUZNER, being first duly sworn, upon oath, deposes and says:

I am a Vice President Special Assets Officer for Washington Federal, the Plaintiff in the above-entitled matter, and I have personal knowledge of the facts herein set forth and the pleadings attached hereto from my personal involvement in managing this loan or from a review of Washington Federal's files.

On September 21, 2015, Washington Federal acting through myself and our attorney of record submitted an offer to Michael R. Hulsey and SM Commercial Properties, LLC through their attorney to resolve the fair market value issue of the collateral to be tried the next day by Plaintiff Washington Federal accepting the fair market value determined by Mr. Hulsey's MAI appraiser, Ed Morse, of \$901,000.00. If this offer had been accepted then there would have been no trial in the above-entitled litigation and a deficiency judgment would have been entered against Mr. Hulsey for the difference between the amount then due of \$1,529,080.76 and the fair market value of \$901,000.00. Mr. Hulsey rejected Washington Federal's offer.

Additionally, attached hereto as Exhibit "A" is a true and accurate copy of Mr. Hulsey's Promissory Note dated August 30, 2005, which memorializes certain terms of the loan.

Attached as Exhibit "B" is a true and accurate copy of an email from Mr. Hulsey to Washington Federal kept and maintained in the files of Washington Federal. I am the custodian of the business records of Washington Federal as they relate to the Hulsey foreclosure and a copy of this email was maintained in the regular course of business of Washington Federal. This email confirms the continuing efforts of Mr. Hulsey to try and convince Washington Federal that Mr. Cox would be purchasing his units as part of a sale of the overall resort which never

occurred in 2013, 2014 or 2015.

Attached hereto as Exhibit "C" is a true and accurate copy of the Idaho Repository docket sheet in this litigation.

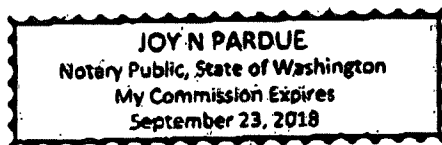
Attached hereto as Exhibit "D" is a true and accurate copy of the appraisal of Ed Morse, MAI, which was delivered to Washington Federal by Mr. Hulsey's attorney as a disclosed trial exhibit for use as an exhibit at trial.


Finally, attached hereto as Exhibit "E" is a true and accurate copy of the email offer from Washington Federal to Mr. Hulsey offering to split the difference between the appraised value of Washington Federal and the appraised value of Mr. Hulsey.

DATED this 6<sup>th</sup> day of January, 2016.

  
ROY CUZNER

SUBSCRIBED AND SWORN TO Before me this 6<sup>th</sup> day of January, 2016.



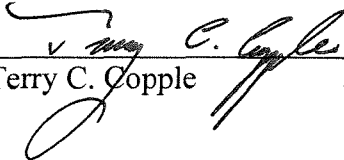
  
NOTARY PUBLIC FOR WASHINGTON  
Residing at Mill Creek, WA, Washington  
My Commission Expires: 9-23-2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of January, 2016, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulse  
and SM Commercial Properties, LLC*

☐ First Class, U.S. MAIL  
☐ Hand Delivery  
☒ Facsimile (208) 667-0500  
☐ Electronic Mail:  
john@magnusononline.com

  
Terry C. Copple

# **EXHIBIT “A”**

to

Affidavit of Roy Cuzner in Support of  
Washington Federal’s Objection and Motion  
to Disallow Attorneys’ Fees and Costs

# PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$1,350,000.00	08-30-2005	09-01-2015	830856445	RENO / 01		SEM	
References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing ***** has been omitted due to text length limitations.							

**Borrower:** Michael R. Hulsey (SSN: 555-62-0993)  
62200 Dear Trail Rd  
Bend, OR 97702

**Lender:** South Valley Bank & Trust  
Commercial Bend Branch  
572 SW Bluff Drive, Suite E  
Bend, OR 97702  
(541) 330-1894

**Principal Amount:** \$1,350,000.00

**Initial Rate:** 7.290%

**Date of Note:** August 30, 2005

**PROMISE TO PAY.** Michael R. Hulsey ("Borrower") promises to pay to South Valley Bank & Trust ("Lender"), or order, in lawful money of the United States of America, the principal amount of One Million Three Hundred Fifty Thousand & 00/100 Dollars (\$1,350,000.00), together with interest on the unpaid principal balance from August 30, 2005, until paid in full. The interest rate will not increase above 24.000%.

**PAYMENT.** Subject to any payment changes resulting from changes in the index, Borrower will pay this loan in 119 regular payments of \$9,795.87 each and one irregular last payment estimated at \$1,080,319.01. Borrower's first payment is due October 1, 2005, and all subsequent payments are due on the same day of each month after that. Borrower's final payment will be due on September 1, 2015, and will be for all principal and all accrued interest not yet paid. Payments include principal and interest. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any unpaid collection costs; and then to any late charges. Interest on this Note is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate over the number of days in a year (365 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this Note is subject to change from time to time based on changes in an independent index which is the weekly average yield on United States Treasury Securities, Adjusted to a Constant Maturity of (3) Three Years: (the "Index"). The Index is not necessarily the lowest rate charged by Lender on its loans. If the Index becomes unavailable during the term of this loan, Lender may designate a substitute index after notice to Borrower. Lender will tell Borrower the current Index rate upon Borrower's request. The interest rate change will not occur more often than each 5 Years. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 4.040% per annum. The interest rate to be applied to the unpaid principal balance of this Note will be at a rate of 3.250 percentage points over the Index, adjusted if necessary for any minimum and maximum rate limitations described below, resulting in an initial rate of 7.290% per annum. Notwithstanding the foregoing, the variable interest rate or rates provided for in this Note will be subject to the following minimum and maximum rates. **NOTICE:** Under no circumstances will the interest rate on this Note be less than 3.000% per annum or more than (except for any higher default rate shown below) the lesser of 24.000% per annum or the maximum rate allowed by applicable law. Notwithstanding the above provisions, the maximum increase or decrease in the interest rate at any one time on this loan will not exceed 10.000 percentage points. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original final maturity date, (B) increase Borrower's payments to cover accruing interest, (C) increase the number of Borrower's payments, and (D) continue Borrower's payments at the same amount and increase Borrower's final payment.

**PREPAYMENT.** Borrower agrees that all loan fees and other prepaid finance charges are earned fully as of the date of the loan and will not be subject to refund upon early payment (whether voluntary or as a result of default), except as otherwise required by law. Except for the foregoing, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: South Valley Bank & Trust, Commercial Bend Branch, 572 SW Bluff Drive, Suite E, Bend, OR 97702.

**LATE CHARGE.** If a payment is 15 days or more late, Borrower will be charged \$20.00.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, Lender, at its option, may, if permitted under applicable law, increase the variable interest rate on this Note to 24.000% per annum. The interest rate will not exceed the maximum rate permitted by applicable law.

**DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note:

**Payment Default.** Borrower fails to make any payment when due under this Note.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with any loan.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The death of Borrower or the dissolution or termination of Borrower's existence as a going business, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Foreclosure Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or foreclosure proceeding and if Borrower gives Lender written notice of the creditor or foreclosure proceeding and deposits with Lender monies or a surety bond for the creditor or foreclosure proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

**Insecurity.** Lender in good faith believes itself insecure.

**Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance on this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.



## Page 2

**BORROWER:**

x Michael R. Hulsey  
Michael R. Hulsey

# **EXHIBIT “B”**

to

Affidavit of Roy Cuzner in Support of  
Washington Federal’s Objection and Motion  
to Disallow Attorneys’ Fees and Costs

-----Original Message-----

From: Michael R. Hulsey [mailto:hulseyco@aol.com]  
Sent: Wednesday, July 31, 2013 5:05 PM  
To: Scott Magness  
Cc: Joey Nguyen  
Subject: RE: Silver Mt

Scott,

I understand the banks position and the loan has not been extended for some time now. If there was anything I could do to speed up the process I would do it. I have done everything that I have been asked to do but this deal has been complicated by Jeld Wen and now Ivan trying to get every dollar out of the transaction.

I do think that the Silver Mt deal with Ivan is going to close within the next couple of weeks for the following reasons. Ivan and Dan have a signed purchase agreement with Jeld Wen and a loan commitment with a Canadian lender. They also have earnest money that has been released to Jeld Wen. Dan told me the earnest money was a million dollars. The purchase price is \$16,800,000.

As Ivan's email indicated he was going to email me the proof of funds on Monday and a new LOI on Tuesday, he has not done neither. I was told that buying my property was part of the loan commitment and I believe that is why Ivan has not sent me the proof of funds. He has made me a new offer of \$1,850,000 which I would accept but if I do accept the new price he would keep dropping the price. I have been waiting out the process with Ivan but the waiting is about over. I borrowed \$91,000 to pay the property taxes and they are now current.

I would have never let them get that far behind but I thought this deal was going to close a year ago and the back due taxes would have been paid out of escrow funds. All of the leases require the tenants to pay the property taxes but if I forced them to pay I would not have one tenant left.

If you call the loan now or if Ivan feels that the loan is in trouble he will work out a deal with his lender to exclude my property and he will wait until the last possible moment to make an offer. If the bank sells to Ivan you will find him as difficult to work with as I have and at this time there is not another buyer for Silver Mt or my properties.

As you know the auction that Jeld Wen held produced no offers or potential buyers. For the time being it is only Ivan and Dan.

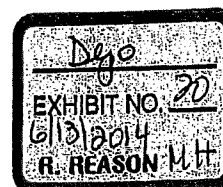
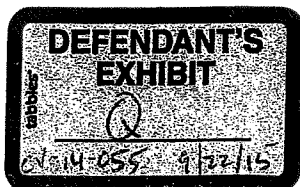
I have made all of the interest payments and other than the couple of months that So. Valley Bank was in agreement with delaying the payments I have never made a late payment. I can keep making the interest payments until the properties sell.

As I always have I will keep you updated and hope to have this property sold within a few weeks.

I am attaching proof of property tax payment.

Thanks,

Mike Hulsey  
SM Commercial Properties, LLC  
PO Box 8600  
Bend, Oregon 97708



# **EXHIBIT “C”**

to

**Affidavit of Roy Cuzner in Support of  
Washington Federal’s Objection and Motion  
to Disallow Attorneys’ Fees and Costs**

**Case Number Result Page****Shoshone****1 Cases Found.****Washington Federal vs. Michael R Hulsey, etal.**

Case: **CV-2014-0000055** District Filed: **01/31/2014** Subtype: **Other Claims** Judge: **Fred M. Gibler** Status: **Pending**

Defendants: **Hulsey, Michael R Morning Star Lodge Owners Association SM Commerical Properties LLC Silver Mountain Corporation**

Plaintiffs: **Washington Federal**

Other Parties: **Welles Rinning Advisory Services LLC**

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
08/11/2014	Partial Dismissal			Silver Mountain Corporation (Defendant), Morning Star Lodge Owners Association (Defendant), Washington Federal (Plaintiff)	Defendant
<p>Comment: Dismissal of Silver Mountain Corporation and Morning Star Lodge Owners Association</p>					
08/18/2014	Forclosure			Hulsey, Michael R (Defendant), SM Commerical Properties LLC (Defendant), Washington Federal (Plaintiff), Welles Rinning Advisory Services LLC (Other Party)	All Parties

Register of Date actions:

01/31/2014 New Case Filed - Other Claims

Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Terry Copple Receipt number: 0000405 Dated: 1/31/2014 Amount: \$96.00 (Check) For: Washington Federal (plaintiff)

01/31/2014 Complaint Filed-Verified Complaint and Application for Appointment of Receiver

01/31/2014 Summons Issued-two orig-retained in the court file

01/31/2014 Motion for Appointment of Receiver

01/31/2014 Affidavit of Roy Cuzner Support Motion for Appointment of Receiver

01/31/2014 Brief in Support of Motion for Appointment of Receiver

01/31/2014 Motion for Service Outside of State

01/31/2014 Affidavit of Terry Copple in Support of Motion for Service Outside State

02/04/2014 Notice Of Hearing on Mtn for Appt of Receiver

02/04/2014 Order For Service Outside of State

02/04/2014 Hearing Scheduled (Motion 03/17/2014 02:45 PM) Mtn for Appt of Receiver

Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: John F Magnuson Receipt number: 0000612 Dated: 02/19/2014 Amount: \$66.00 (Check) For: Hulsey, Michael R (defendant) and SM Commerical Properties LLC (defendant)

02/19/2014 Notice Of Appearance/Atty Magnuson for Defendants, Michael Hulsey and SM Commercial Properties LLC

02/19/2014 Acceptance Of Service By Attorney/of John F Magnuson

Affidavit of Terry Copple in re: to returning the original Summons

**1555**

02/21/2014 (three of them) and in Support of Issuing Summons for the Amended Verified Complaint

02/25/2014 Motion for Service Outside of State (Amended Complaint)

02/25/2014 Order for Service Outside of State (Amended Complaint)

02/25/2014 Supplemental Affidavit of Roy Cuzner Support Motion for Appointment of Receiver

02/25/2014 Amended Complaint Filed and Application for Appointment of Receiver Summons Issued-Three Original Summons issued re: the Verified

02/25/2014 Amended Complaint-the original were returned to the Attorney of Record as requested

02/26/2014 Acceptance Of Service By Attorney/Atty Magnuson for Defs. Michael Hulsey and SM Properties 2/17/2014

03/05/2014 Certificate Of Service/Plnt's First Set of Int and RFPD to Defs

03/10/2014 Affidavit of Jim Koon Re: Motion For Appointment of Receiver

03/10/2014 Lis Pendens/(recorded in Shoshone County)

03/10/2014 Affidavit Regarding Litigation Guarantee

Memorandum of Defendants Hulsey and SM Commercial Properties,

03/10/2014 LLC In Response To Plnt's Motion For Appointment of Receiver/cc: Judge Gibler and Scott

03/10/2014 Objection of Defendants Hulsey and SM Commercial Properties LLC To Plaintiff's Submissions

03/10/2014 Affidavit of John F Magnuson

03/11/2014 Affidavit of Jim Koon Re: Mtn for Appt of Receiver

03/13/2014 Stipulation

Court Minutes Hearing type: Motion Hearing date: 3/17/2014 Time:

03/17/2014 2:34 pm Courtroom: District Courtroom 3rd Floor Court reporter: Minutes Clerk: TARA Tape Number:

Hearing result for Motion scheduled on 03/17/2014 02:45 PM: District

03/17/2014 Court Hearing Held Court Reporter:BC Number of Transcript Pages for this hearing estimated: Mtn for Appt of Receiver

03/17/2014 Order Regarding Appt of Receiver and Property Manager

03/17/2014 Order Appointing Reciever

03/17/2014 Oath of Reveiver Welle Rinning Advisory Services, LLC

03/17/2014 Certificate of Appointment of Receiver Welles Rinning Advisory Services, LLC

03/17/2014 Summons Returned/svd Silver Mountain Corp 3/10/2014

Filing: I1 - Initial Appearance by persons other than the plaintiff or

03/21/2014 petitioner Paid by: Stoel Rives Receipt number: 0001142 Dated: 3/21/2014 Amount: \$66.00 (Check) For: Silver Mountain Corporation (defendant)

Filing: I1 - Initial Appearance by persons other than the plaintiff or

04/02/2014 petitioner Paid by: Witherspoon Kelley Receipt number: 0001299 Dated: 4/2/2014 Amount: \$66.00 (Check) For: Welles Rinning Advisory Services LLC (other party)

04/02/2014 Notice Of Appearance/Atty Haynes for Custodial Receiver, Welles Rinning Advisory Services LLC

04/02/2014 Notice of Discovery/Defs' Resp to Plnts' First Set of Int and RFPD to Defs

04/03/2014 Notice of Appointment of Receiver/Welles Rinning Advisory Services LLC

04/03/2014 Errata To Notice of Appearance

Order the Plt is entitled to file its Second Amended Complaint joining

04/10/2014 Def Morning Star Lodge Owners Assoc as Idaho non-profit assoc as a party to the litigation

04/14/2014 2nd Amended Complaint Filed

Summons Issued re: the 2nd Amended Complaint-orig retained in the

1556

04/14/2014 court file

04/17/2014 Stipulation For Entry of Protective Order

04/24/2014 Acknowledgement Of Service by Attorney

04/28/2014 Notice To Take Deposition of Michael R Hulsey

04/30/2014 Protective Order

05/01/2014 Acknowledgement Of Service By Attorney

05/05/2014 Request For Trial Setting/cc: Tara  
Filing: I1 - Initial Appearance by persons other than the plaintiff or  
petitioner Paid by: Bradley J Dixon Receipt number: 0001788 Dated:  
05/07/2014 5/7/2014 Amount: \$66.00 (Check) For: Morning Star Lodge Owners  
Association (defendant)

05/07/2014 Notice Of Appearance On Behalf of Morning Star Lodge Owners  
Association/Atty Dixon

05/08/2014 Affidavit Regarding Protective Order

05/08/2014 Receiver's Monthly Report For March Through April 30, 2014

05/08/2014 Notice of Intent To Compensate (January 2014 Through April 2014)

05/13/2014 Notice Of Discovery/Defts Hulsey and SM Commercial Properties LLC's  
First Set of Int and RFPD to Plnt

05/13/2014 Response To Request For Trial Setting (On Behalf of Defendants Hulsey  
and SM Commercial Properties LLC)/cc: Tara  
Answer of Defendants Hulsey and SM Commercial Properties to the

05/23/2014 Second Amended Verified Complaint and Application for Appointment of  
Receiver

06/04/2014 Hearing Scheduled (Scheduling Conference 07/21/2014 01:45 PM)

06/04/2014 Notice Of Hearing

06/11/2014 Receiver's Monthly Report For May 2014

06/13/2014 Stipulation to Appear Telephonically For Scheduling Conference

06/16/2014 Notice Of Service (from Terry Copple)

06/17/2014 Order Granting Telephonic Scheduling Conference

07/03/2014 Motion for Summary Judgment

07/03/2014 WA Federal's Brief Support of Motion for Summary Judgment

07/03/2014 Notice of Pleadings in Court Record Support WA Federal's Motion for  
Summary Judgment

07/03/2014 Affidavit of Roy Cuzner with Regard to Merger of WA Federal with  
South Valley Bank & Trust

07/03/2014 Notice Of Hearing on Motion for Summary Judgment

07/03/2014 Affidavit of Vicki Mundlin Mai Support of Motion for Summary Judgment

07/03/2014 Notice of the Filing of Deposition of Michael Hulsey

07/03/2014 Hearing Scheduled (Motion for Summary Judgment 08/18/2014 01:30  
PM)

07/07/2014 Notice of Intent To Compensate (May 2014 through June 2014)

07/17/2014 Stipulation to Dismiss Silver Mountain Corp and Morning Star Lodge  
Owners Association  
Court Minutes Hearing type: Scheduling Conference Hearing date:  
07/21/2014 7/21/2014 Time: 1:54 pm Courtroom: District Courtroom 3rd Floor  
Court reporter: Minutes Clerk: TARA Tape Number:  
Hearing result for Scheduling Conference scheduled on 07/21/2014  
07/21/2014 01:45 PM: District Court Hearing Held Court Reporter: Cinnamon  
Number of Transcript Pages for this hearing estimated:

07/23/2014 Stipulation to Permit Receiver to Extend Leases (units 2 and 3)

07/25/2014 Hearing Scheduled (Pretrial Conference 11/03/2014 01:15 PM)

07/25/2014 Hearing Scheduled (Court Trial 12/10/2014 09:00 AM) 2 Day Court  
Trial

07/25/2014 Notice Of Trial

1557

07/25/2014 Order To Permit Receiver to Extend Leases (units 2 and 3)

07/29/2014 Receiver's Monthly Report For June 2014

07/29/2014 Second Affidavit of John F Magnuson Re: Objection To Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

07/29/2014 Notice Of Hearing On "Objection To Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)"

Hearing Scheduled (Hearing Scheduled 08/18/2014 01:30 PM)

07/29/2014 Objection To Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

07/30/2014 Motion In Aid of Objection To: Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

07/30/2014 Affidavit of John F Magnuson

08/05/2014 Declaration of Michael Hulsey-copies to the Judge and Scott

08/05/2014 Defendant's Brief in Opposition to Washington Federal's Motion for Summary Judgment-copies to the Judge and Scott

08/06/2014 Washington Federal's Response To Motion In Aid of Objection To Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

08/06/2014 Washington Federal's Reply Brief To Defs' Brief In Opposition To Motion For Summary Judgment/cc: Judge Gibler and Scott

08/08/2014 Declaration of David J Rinning In Support of Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

08/11/2014 Civil Disposition entered for: Partial Dismissal-Morning Star Lodge Owners Association and Silver Mountain Corporation

08/12/2014 Disclosure of Expert Witnesses

08/12/2014 Notice of Compliance With Expert Witness Disclosures

08/13/2014 Receiver's Motion To Attend August 18, 2014 Hearings Telephonically

08/15/2014 Stipulation for Counsel to Appear Telephonically-re: all Counsel

08/15/2014 Order Granting Telephonic Hearing

Court Minutes Hearing type: Motion for Summary Judgment Hearing

08/18/2014 date: 8/18/2014 Time: 1:25 pm Courtroom: District Courtroom 3rd Floor Court reporter: Minutes Clerk: TARA Tape Number:

Hearing result for Hearing Scheduled scheduled on 08/18/2014 01:30 PM: District Court Hearing Held Court Reporter:CINNAMON Number of Transcript Pages for this hearing estimated: Objection To Stipulation To Permit Receiver To Extend Leases (Units 2 and 3)

08/18/2014

Hearing result for Motion for Summary Judgment scheduled on 08/18/2014 01:30 PM: District Court Hearing Held - Decision out in 30 Days Court Reporter:CINNAMON Number of Transcript Pages for this hearing estimated: attorneys will be telephonic

08/18/2014

08/18/2014 Order authorizing Telephonic Appearance at 8/18/14

08/18/2014 Stipulation for Entry of Judgment and Decree of Foreclosure (order of sale)

08/18/2014 Judgment and Decree of Foreclosure (Order of Sale)

08/18/2014 Civil Disposition entered for: Judgment and Decree of Foreclosure (Order for Sale)

08/21/2014 Order Re: Extension of Leases - Def's Objection is Denied

08/26/2014 Receiver's Monthly Report For July 2014

09/04/2014 Receiver's Monthly Report For August 2014

09/04/2014 Motion For Reconsideration of "Order Re: Extension of Leases"

09/08/2014 Objection To Motion For Reconsideration

09/09/2014 Affidavit of Amount Due

09/09/2014 Writ Issued

09/09/2014 Notice of Intent To Compensate (July through August 2014)

09/11/2014 Reply Memorandum In Support of Motion For Reconsideration of "Order Re: Extension of Leases"/Atty Magnuson /cc: Judge Gibler and Scott

09/11/2014 Affidavit of John F Magnuson In Support of Motion For Reconsideration

1558



Washington's Federal's Response to Hulsey's Reply Memorandum in  
 09/12/2014 Support of Mtn for Reconsideration

09/18/2014 Order Denying Reconsideration is Denied

10/06/2014 Receiver's Monthly Report for September 2014

10/17/2014 Stipulation for Counsel to Appear Telephonically on 11/3/14 hearing

10/17/2014 Order to Appear Telephonic on 11/3/14 hrg

10/20/2014 Request for Supplementation of Discovery Responses (from Terry Copple)

10/30/2014 Notice of Bankruptcy Case Filing (Defendant SM Commercial Properties LLC)  
 Court Minutes Hearing type: Pretrial Conference Hearing date:  
 11/03/2014 11/3/2014 Time: 1:18 pm Courtroom: District Courtroom 3rd Floor  
 Court reporter: Minutes Clerk: TARA Tape Number:  
 11/03/2014 Hearing result for Pretrial Conference scheduled on 11/03/2014 01:15 PM: Pre-trial Conference copple telephonic

11/04/2014 Writ Returned-on the 9-9-2014 Writ-Notice of Levy, etc. Returned Unsatisfied

11/14/2014 Hearing Scheduled (Status 11/17/2014 01:15 PM) TELEPHONIC

11/14/2014 Notice Of Hearing  
 Court Minutes Hearing type: Status Hearing date: 11/17/2014 Time:  
 11/17/2014 1:10 pm Courtroom: District Courtroom 3rd Floor Court reporter:  
 Minutes Clerk: TARA Tape Number:  
 Hearing result for Status scheduled on 11/17/2014 01:15 PM: District  
 11/17/2014 Court Hearing Held- trial vacated bankruptcy stay waiting on pw Court  
 Reporter: BYRL CINNAMON Number of Transcript Pages for this hearing  
 estimated: TELEPHONIC

11/17/2014 Hearing result for Court Trial scheduled on 12/10/2014 09:00 AM:  
 Hearing Vacated 2 Day Court Trial

12/24/2014 Notice of Intent To Compensate (September 1, 2014 through October 29, 2014)

12/30/2014 Receiver's Monthly Report For October and November 2014

01/02/2015 Notice of Entry of Bankruptcy Court Order Authorizing Foreclosure

01/07/2015 Affidavit Of Amount Due

01/07/2015 Request for Trial Setting for Determination of Deficiency Liability

01/09/2015 Receiver's Monthly Report For December 2014  
 Response of Defendants Michael R Hulsey and SM Commercial  
 01/14/2015 Properties LLC To Plnt's Request For Trial Setting For Determination of  
 Deficiency Liability/cc: Tara

01/15/2015 Writ of Execution (Order of Sale) Issued

01/20/2015 Notice of Discovery (from John Magnuson)

01/20/2015 Notice of Intent to Compensate

01/23/2015 Hearing Scheduled (Pretrial Conference 07/20/2015 01:00 PM)

01/23/2015 Hearing Scheduled (Court Trial 08/11/2015 09:00 AM) 2 Days

01/23/2015 Notice Of Trial

01/28/2015 Notice Of Service  
 Notice Of Service/Plnt's Answers and Resp to Defs Hulsey and SM  
 02/03/2015 Commercial Properties LLC Second Set of Continuing Int and RFPD to  
 Plnt

02/05/2015 Receiver's Monthly Report For January 2015  
 Notice Of Discovery/Defs Hulsey and SM Commercial Properties LLC  
 02/05/2015 First Set of Continuing Int and RFPD to Welles Rinning Advisory  
 Services LLC

02/11/2015 Expert Witness Disclosure by Defendant's SM Commercial Properties  
 LLC and Hulsey

02/13/2015 Notice of Intent to Compensate (January 2015)

02/17/2015 Notice of Entry of Order of Dismissal of SM Commerical Properties LLC's Chapter 11 Proceeding

03/05/2015 Writ Returned-on the 1-15-2015 Writ-Sale held, awarded to the Plaintiff-returned as satisfied

03/06/2015 Notice of Intent To Compensate (February 2015)

03/09/2015 Motion for Termination of Receivership

03/09/2015 Affidavit of Roy Cusner in Support of Motion for Termination of Receivership

03/09/2015 Notice Of Hearing of Motion for Termination of Receivership

03/09/2015 Hearing Scheduled (Motion 04/13/2015 01:15 PM) Plt's Motion for Termination of Receivership

03/10/2015 Notice of Responses to Discovery (from Robin Haynes)

03/10/2015 Disclosure of Expert Witness (from Terry Copple)

03/16/2015 Receiver's Monthly Report for February 2015

03/18/2015 Stipulation For Counsel To Appear Telephonically/(April 13, 2015 at 1:15 pm)

03/23/2015 Order Granting Telephonic Hearing/(April 13, 2015 at 1:15 pm)

04/02/2015 Notice of Telephonic Deposition Duces Tecum (Ed Morse, CRE, MAI)

04/03/2015 Receiver's Monthly Report for March 2015

04/06/2015 Notice Of Intent To Compensate (March 2015)

04/09/2015 Receiver's Final Report and Accounting

04/09/2015 Declaration of David J Rinning In Support of Motion For Termination of Receivership

04/10/2015 Notice of Filing of Proposed Order Terminating Receivership

04/13/2015 Court Minutes Hearing type: Motion Hearing date: 4/13/2015 Time: 1:15 pm Courtroom: District Courtroom 3rd Floor Court reporter: Minutes Clerk: TARA Tape Number: Hearing result for Motion scheduled on 04/13/2015 01:15 PM: District Court Hearing Held Court Reporter:cinnamon Number of Transcript Pages for this hearing estimated: Plt's Motion for Termination of Receivership

04/13/2015 Order Approving Reciever's Final Report and Discharging Receiver

05/01/2015 Stipulation To Entry of Order On Receiver's "Notice of Intent To Compensate (March 2015)"

05/05/2015 Order on Objection to Receiver's Notice of Intent to Compensate (March 2015)

05/06/2015 First Supplemental Disclosure of Expert Witness/Atty Terry Copple

05/11/2015 Discharge Certificate (Discharging the Receiver)

05/11/2015 First Supplemental Disclosure of Expert Witness

05/28/2015 Notice of Telephonic Deposition Duces Tecum-Ed Morse

06/02/2015 Notice Of Service/Washington Federal's Supplemental Answers and Responses to Defs Hulsey and SM Commerical Properties LLC Continuing Int and RFPD to Plnt

07/07/2015 Hearing result for Pretrial Conference scheduled on 07/20/2015 01:00 PM: Continued

07/07/2015 Hearing result for Court Trial scheduled on 08/11/2015 09:00 AM: Continued 2 Days

07/07/2015 Hearing Scheduled (Pretrial Conference 08/17/2015 01:15 PM)

07/07/2015 Hearing Scheduled (Court Trial 09/22/2015 09:00 AM) 2 Days

07/07/2015 Amended Notice Of Trial

07/29/2015 Stipulation For Counsel to Appear Telephonically for 8/17/15 hrg at 1:15

07/30/2015 Order Granting Telephonic Hrg- Copple

Court Minutes Hearing type: Pretrial Conference Hearing date:

1560

08/17/2015 8/17/2015 11:43 am Courtroom: District Courtroom 3rd Floor  
Court reporter: Minutes Clerk: TARA Tape Number:

08/17/2015 Hearing result for Pretrial Conference scheduled on 08/17/2015 01:15 PM: Pre-trial Conference

08/17/2015 Notice Of Hearing

08/20/2015 Hearing Scheduled (Status 09/09/2015 01:30 PM)

08/25/2015 Motion for Telephonic Hearing

08/25/2015 Order for Telephonic Hearing  
Court Minutes Hearing type: Status Hearing date: 9/9/2015 Time:

09/09/2015 1:25 pm Courtroom: District Courtroom 3rd Floor Court reporter:  
Minutes Clerk: TARA Tape Number:

09/09/2015 Hearing result for Status scheduled on 09/09/2015 01:30 PM: Hearing  
Held SET FOR COURT TRIAL ON 9/22/15

09/10/2015 Disclosure of Trial Witnesses by Def's Michael R. Husley and SM  
Commerical Properties, LLC

09/10/2015 Def's Michael R. Hulsey and SM Commerical Peroperties, LLC Exhibit  
List

09/11/2015 WA Fed Trial Exhibit List

09/11/2015 Plt's WA Fed is Disclosure of Trial Witnesses

09/11/2015 Plt's WA Fed's Proposed Findings of Fact and Conclusions of Law

09/11/2015 Wa Fed Trial Brief

09/14/2015 Supplemental Trial Witness Disclosure Statement of Plaintiff  
Washington Federal

09/15/2015 Plaintiff Washington Federal's Motion In Limine To Exclude Evidence

09/15/2015 Affidavit of Terry C Copple In Support of Plaintiff Washington Federal's  
Motion In Limine To Exclude Evidence

09/15/2015 Notice Of Hearing On Plaintiff Washington Federal's Motion In Limine  
To Exclude Evidence

09/15/2015 Hearing Scheduled (Motion in Limine 09/22/2015 09:00 AM) Plnt  
Washington Federal's Motion In Limine To Exclude Evidence

09/15/2015 Proposed Findings of Fact and Conclusions of Law on Behalf of Def's  
Hulsey and SM Commerical Prop, LLC

09/15/2015 Findings of Fact and Conclusions of Law

09/15/2015 Trial Brief (Defense)

09/16/2015 Case File Out 3 and 4 to Judge Simpson for review on trial next week

09/17/2015 Affidavit Authenticating Bankruptcy Court Hearing Transcript

09/17/2015 Defendants Michael R Hulsey and SM Commercial Properties LLC's First  
Amended Exhibit List

09/18/2015 Def's Memorandum in Opposition to Plt WA Fed's Mtn in Limine to  
Exclude Evidence

09/18/2015 Def's Michael R. Hulsey and SM Commerical Properties, LLC First  
Amended Exhibit List  
Court Minutes Hearing type: Court Trial Hearing date: 9/22/2015

09/22/2015 Time: 8:45 am Courtroom: District Courtroom 3rd Floor Court  
reporter: Minutes Clerk: TARA Tape Number:

09/22/2015 Hearing result for Motion in Limine scheduled on 09/22/2015 09:00  
AM: District Court Hearing Held Court Reporter:bc Number of  
Transcript Pages for this hearing estimated: Plnt Washington Federal's  
Motion In Limine To Exclude Evidence

09/22/2015 Hearing result for Court Trial scheduled on 09/22/2015 09:00 AM:  
Court Trial Started 2 Days

09/25/2015 Post-Trial Briefing Order

10/07/2015 Washington Federal's Post-Trial Brief

10/07/2015 Affidavit Authenticating Trial Transcript Regarding the Direct and Cross-  
Examination of Defendant Michael Hulsey on September 22, 2015

1561

10/08/2015 Post-Trial Opening Brief of Defendants Hulsey and SM Commercial Properties LLC/cc: Judge Gibler and Scott

10/09/2015 Case File Out to Judge Simpson in CDA

10/15/2015 Post-Trial Reply Brief of Defendant's Hulsey and SM Commercial Properties-copies were e-mailed to Judge Simpson

10/15/2015 Post-Trial Reply Brief of Plt's Washington Federal-copies were e-mailed to Judge Simpson

10/20/2015 Defendants' Motion To Strike/Atty Magnuson

10/21/2015 Washington Federal's Response to Defendant's Motion to Strike

10/21/2015 Plaintiff Washington Federal's Motion to Strike

10/23/2015 Defendant's Opposition to Plaintiff Washington Federal's Motion to Strike

11/13/2015 Memorandum of Decision

12/23/2015 Memorandum of Costs and Att Fees - copple

12/23/2015 Wa Fed's Mtn for Award of Attorneys Fees and Costs

12/23/2015 Affidavit of Terry Copple in support of memorandum of Costs and Att Fees

12/31/2015 Motion for Award of Attorney Fees and Costs by Defendant's Hulsey and SM Commercial Properties

12/31/2015 Affidavit of John Magnuson in Support of Defendants Hulsey and SM Commercial LLC's Memorandum of Costs and Attorney Fees, etc.

12/31/2015 Memorandum of Costs and Attorney Fees on Behalf of Defendant's Hulsey and SM Commercial Properties

*Connection: Public*

# **EXHIBIT “D”**

to

Affidavit of Roy Cuzner in Support of  
Washington Federal’s Objection and Motion  
to Disallow Attorneys’ Fees and Costs



# MORSE & COMPANY

Real Estate Appraisers and Counselors

Ed Morse, MBA, JD, CRE, MAI

CRE  
THE COUNSELORS OF REAL ESTATE  
Ed Morse, CRE

September 16, 2015

Mr. John Magnuson, Attorney at Law  
P. O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, Idaho 83816

Re: Update of my prior Appraisal – Morning Star Lodge, 610 Bunker Avenue, Kellogg

Dear Mr. Magnuson:

I previously appraised units in Morning Star Lodge. My prior appraisal report has a transmittal letter dated May 5, 2015. The report expressed an opinion of value for identified units in Morning Star Lodge as of the date of value, March 3, 2015.

## INCORPORATION BY REFERENCE

This update report summarizes revisions to the analyses and conclusions of my prior appraisal report. My prior appraisal report, including attachments and addendum materials is *incorporated by reference* into to this update report. That prior report describes the property, the analyses, opinions, conclusions, and includes supporting data.

## UPDATE PROVISIONS

This update report is prepared for the same client, John Magnuson, as the original report. The intended use of the report is the same, to estimate market value for a deficiency suit against your client, SM Commercial Properties LLC. The intended user of this update report is yourself.

The effective date of value, i.e. the date of valuation is March 3, 2015. The date of this report is September 16, 2015.

**Legal Description:** The legal description was taken from documents supplied by Deschutes County Title with a pending purchase agreement whose legal description is as follows:  
Commercial Units No.'s 1, 2, 3, 4, 5, 6a, 6b, in the Morning Star Lodge Condominium Plat as shown in the Morning Star Lodge CC&R's Declaration, recorded February 10, 2005 as instrument No. 421817, records of Shoshone County, Idaho together with undivided interests in common area. AND

Commercial Unit No.'s 7a, 7b, 7c of Morning Star Lodge Condominiums, a replat of Building B, Unit 7, recorded February 23, 2007, Instrument No. 436148, being a part of the Morning

1564



Star Lodge Condo Plat as shown in the CC&R declaration recorded February 10, 2005 as Instrument No. 421817, recorded in Shoshone County, Idaho, together with any undivided interest in any common elements.

Parts of the above legal description conflict with the notice of Sherriff's Sale description which is:

Commercial Units Nos. 1, 2, 3, 4, 5, 6a, 6b, and 7 of the Morning Star Lodge Condominium as shown in the CC&R declaration No. 421817 in Shoshone County, Idaho together with any undivided interests in common areas.

The Sherriff's sale notice, and part of the Deschutes County Title description omits the Building A or Building B designations in the legal descriptions. Both the legal descriptions include Units #6a, #6b, when there is only Unit #6 in Building A shown on the plat. There are no Units #6a, #6b. The third issue is that the original plat and Instrument No. 421817 was amended by the replat in Instrument No. 436148 which established Units #7a, #7b, and #7c., in Building B

For purposes of this appraisal, the units are described as:

Commercial Unit Nos. 1, 2, 3, 4, 5, 6, in Building A, Morning Star Lodge Condominium Plat as shown in Instrument No. 421817 in the records of Shoshone County, Idaho, together with all undivided interests. AND

Commercial Units Nos. 7a, 7b, and 7c, in Building B, Morning Star Lodge Condominium Re-Plat as shown in Instrument No. 436148, records of Shoshone County, Idaho, together with all undivided interests.

**Estate & Interest Appraised:** The leased fee interest for those units leased [excludes Units #5, #7a, #7b, #7c] which are not leased; and the fee interest in the unleased units (Units #5, #7a, #7b, #7c) all owned by condominium estate, subject to CC&R's and interests of record. Based upon the title report provided for the purchase, it appears that the mineral estate has been severed on lands under the condo and it is owned by others. The utility of the property is the use of the surface condo units as they exist under the condo declaration and bylaws.

#### **THE PRIOR APPRAISAL REPORT**

It is important that the user of this update report has a copy of, and can follow the changes to the prior appraisal report. The background data, research, comps, and analysis are contained in the prior appraisal report, which is incorporated into this report by reference.

#### **REPORT CHANGES IN THIS UPDATE**

All of the prior content, including the analyses, data, explanations and opinions are incorporated into this update. The following spreadsheets and analyses revise certain calculations in the income capitalization and conclusions to the appraisal.

1565

## EXTRAORDINARY ASSUMPTIONS AND HYPOTHETICAL CONDITIONS

This appraisal is based upon the following assignment-specific extraordinary assumptions and/or hypothetical conditions. The use of an extraordinary assumption or hypothetical condition may affect the assignment results.

1. This appraisal analysis is based upon the payment stream and payments provided from and shown in statements from the receiver and property manager. The appraiser was provided parts of all the leases, but not all of the lease documents. Some lease amendments are not clear, and it is not clear if rents are being adjusted upward by CPI adjustments in leases to Silver Mountain Corp. The lease analysis in this report is based upon the current payment streams, as reported in documents provided to the appraiser as of the date of value. There may be some upside income if CPI adjustments are being applied.
2. The appraisal does not consider a 5% reduction in assessed value for 2015 that was not known or available in March 2015 because it wasn't available until the 2015 tax assessments were mailed in May-June 2015.
3. The extraordinary assumptions and limiting conditions from the prior appraisal are incorporated into this report update.

## INCOME APPROACH

The following two tables showing HOA fees and property tax cost are helpful in understanding treatment of special analysis for the condo units by the Income Capitalization Approach. These two assessments require special treatment in this approach. OA costs are summarized below. This information supplements the Income Approach in the prior report. All other information in the Income Approach is incorporated into this update.

Owners Assn Costs - SM COMMERCIAL LLC					
Unit #/Bld	Size-sf	Rent/mo	Rem.Term	OA fee/yr	\$/SF/Unit
#1/Bld A	1,558	\$3,996	Sept -15	\$5,748	\$3.69
#2/Bld A	119	\$ 300	Sept-17	\$ 444	\$3.73
#3/Bld A	246	\$ 375	Sept-17	\$ 912	\$3.71
#4/Bld A	1,732	\$2,251	Sept-15	\$6,396	\$3.69
#5/Bld A	587	\$ 0	0	\$2,316	\$3.95
#6/Bld A	227	\$ 289	Sept-15	\$ 840	\$3.70
#7a/Bld B	1,393	\$1,640	mo/mo	\$5,136	\$3.69
#7b/Bld B	1,112	\$1,076	mo/mo	\$4,104	\$3.69
#7c/Bld B	1,393	\$ 0	0	\$5,136	\$3.69
Total	8,367			\$31,052	

1566



The table below was on page 35 of the report and it demonstrates the tax inequity and assessed values for tax purposes. This assists the reader in understanding the property tax problem.

TAXES AND ASSESSED VALUES -Morning Star Lodge units						
Unit #/Bld	Size	Assessed Value	AV/SF	Taxes	Parcel #	RE Taxes/SF
1/A	1,558	\$240,390	\$154	\$5,581.80	D950000A0010 A	\$ 3.58
2/A	119	\$ 62,290	\$523	\$1,514.76	D950000A0020 A	\$12.73
3/A	246	\$ 18,058	\$ 73	\$ 493.26	D950000A0030 A	\$ 2.01
4/A	1,732	\$254,890	\$147	\$5,913.70	D950000A0040 A	\$ 3.41
5/A	587	\$142,670	\$243	\$3,345.30	D950000A0050 A	\$ 5.70
6/A	227	\$ 13,771	\$ 61	\$ 395.16	D950000A0060 A	\$ 1.74
7a/B	1,393	\$223,260	\$160	\$5,189.76	D950000B07A0 A	\$ 3.73
7b/B	1,112	\$188,720	\$170	\$4,399.24	D950000B07B0 A	\$ 3.96
7c/B	1,393	\$223,260	\$160	\$5,189.76	D950000B07C0 A	\$ 3.73
		\$1,367,309		\$32,022.74		

The tax assessment in 2014 vastly exceeds property value. Taxes range from \$1.74/sf to \$12.73/sf despite quite similar units. Real Property is appraised under responsible ownership and competent property management, based upon the highest and best use of the property. See assumption #1 in the enclosed Assumptions and Limiting Conditions.

On page 50 of the report, Unit #7a is shown under expenses to have NNN rent. The tenant had not been paying OA fees. This rental is shown in the table on page 53 as month to month at the existing rental rate, which is correct.

All other descriptions, analyses, expenses, rents, cap and yield rates in the original report are used in this update and are incorporated into this analysis unless otherwise modified in this update report.

On page 54, first paragraph, the statement that current vacancy pressures appear caused by current management and poor snow conditions needs supplemental explanation. There is a large amount of uptown vacancy in older sub-standard buildings in Kellogg. Those do not compete with the subject units, as they lack direct access to skiers and mountain bikers using the resort. Current resort management has curtailed Gondola operations two days per week, and this diminishes weekday use, room rentals, and surrounding business traffic. The snow conditions have been poor during the winter of 2014-15, and this condition is considered temporary, not permanent. The northwest is in the midst of a record drought. These are conditions that would not be considered permanent but they have affected tenants in Units #7a and #7b.

The spreadsheet used to value the fee simple reversionary interest, and the present worth analysis of the lease income payments are summarized in the following spreadsheet. The

1567

analysis uses the same 10% discount rate; and the leased fee analysis uses contract income. The spreadsheet below uses market rents upon lease expiration and the reversionary value of capitalized income is \$581,883. This analysis replaces the analysis on page 54-55 of the report.

<b>LEASED FEE ANALYSIS – UNITS #1; #4; #6</b>				
Annual Discount Rate				10.0%
	# Pymnts	Rent	Deferred Factor	Pres. Value
Unit #/Bldg			#1, #4, #6/Bldg A	
3/3/2015 to 3/31/2015	1	\$ 0	1.000000	\$ 0
4/1/2015 to 8/31/2015	5	\$ 6,536	4.877391	\$ 31,879
Present Value of Rents				\$ 31,879
Reversion		<u>\$581,883</u>	0.951427	<u>\$553,619</u>
Leased Fee Interest				\$585,498

For the lease analysis for the above Units #1, #4, #6, and subsequent analysis of Units #2 and #3, the cash flows are discounted for the initial payment month because the rent payment due at the first of March is excluded from the value, and the rent due April and thereafter is discounted by the additional period. This discounts the income stream by 6 months for spreadsheet above, and for 30 months for Units #2 and #3, using beginning of period payments and a 10% yield rate. The resulting factor is then adjusted for the loss of the March payment by subtracting 1. The same process was used for the analysis of Units #2 and #3. The reversion value is discounted over the total term, 6 months in the above spreadsheet and 30 months for the analysis of Units #2 and #3. The yield rate used to discount the payments is higher than the market overall rate. The discount rate reflects a premium above the overall rate [8.1% + 1.9%] to reflect the higher return and less appreciation from the lease income stream. The indicated value for Units #1, #4 and #6 under this analysis by the Income Capitalization Approach is concluded to be \$585,498, rounded to \$585,500. Units #1, #4 and #6 were leased until September 2015, so only five months of rental income remained in the lease term.

INCOME CAPITALIZATION APPROACH - OVERALL RATE						
SM Commercial - Units #1, #4, #6						
GROSS INCOME ESTIMATE:					Income	%age of Eff Gross
Type	Size		Rate/SF			
Unit #1	1,558	x	\$25.00	/ Yr =	\$38,950	
Unit #4	1,732	x	\$14.00	/ Yr =	\$24,248	
Unit #6	227	x	\$12.00	/ Yr =	\$2,724	
Potential Gross Rents					\$65,922	79.42%
Reimbursed HOA Fees					\$12,984	
Reimbursed Taxes					\$13,318	
Total Potential Gross Income					\$92,224	111.11%
Vacancy & Credit Loss @ 10%					(\$9,222)	13.99%
EFFECTIVE GROSS INCOME					\$83,001	100.00%
EXPENSES:						
Fixed Expenses -						
Real Property Tax-			\$13,318		(\$13,318)	-16.05%
Insurance -			\$739		(\$739)	-0.89%
Operating Expenses -						
Utilities - Landlord Expenses			\$0.00			0.00%
Management			10.00%		(\$8,300)	-10.00%
Maint. & Repairs			\$528			
Reimbursed HOA Fees			\$12,984			
Supplies			\$0		(\$13,512)	-16.28%
Reserves for Replacements -						
Building Components-			0.00%		\$0	0.00%
Total Expenses					(\$35,869)	-43.21%
NET OPERATING INCOME					\$47,133	56.79%
At 8.1% Overall Rate - Value of Reversion in Fee					\$ 10%	
ESTIMATED REVERSION VALUE					\$581,883	

On pages 55-56 of the original report, Units #2 and #3 are analyzed separately in two steps. The leases on these two units expire in September 2017, or in 29 months. These are net leased, and the tenant is paying OA fees and property taxes. There are 29 months of income remaining that are discounted at 10% to their present worth, and the capitalized value of the reversionary interest is added to the present worth of the income stream.

The value of these units is calculated in the following two-step process in the two following spreadsheets. The value of the reversion is determined using market rents at lease expiration in 29 months. This value estimate uses a 10% vacancy factor for these units, and calculates a tax liability based upon the current tax levy rate. The value of the reversion is \$55,952, say \$56,000.

INCOME CAPITALIZATION APPROACH - OVERALL RATE					SM Commercial - Units #2, #3	
GROSS INCOME ESTIMATE:					Income	%age of Eff Gross
Type	Size		Rate/SF			
Unit #2	119	x	\$25.00	/ Yr =	\$2,975	
Unit #3	245	x	\$14.00	/ Yr =	\$3,430	
		x		/ Yr =	\$0	
Potential Gross Rents					\$6,405	78.71%
Reimbursed HOA Fees					\$1,356	
Reimbursed Taxes					\$1,281	
Total Potential Gross Income					\$9,042	111.11%
Vacancy & Credit Loss @ 10%					(\$904)	14.12%
EFFECTIVE GROSS INCOME					\$8,137	100.00%
EXPENSES:						
Fixed Expenses -						
Real Property Tax-			\$1,281		(\$1,281)	-15.74%
Insurance -			\$100		(\$100)	-1.23%
Operating Expenses -						
Utilities - Landlord Expenses			\$0.00			0.00%
Management			10.00%		(\$814)	-10.00%
Maint. & Repairs			\$55			
Reimbursed HOA Fees			\$1,356			
Supplies			\$0		(\$1,411)	-17.34%
Reserves for Replacements -						
Building Components-			0.00%		\$0	0.00%
Total Expenses					(\$3,605)	-44.31%
NET OPERATING INCOME					\$4,532	55.69%
At 8.1% Overall Rate - Value of Reversion in Fee					8.10%	
ESTIMATED REVERSION VALUE					\$56,952	

The present worth of the 29 months of lease payments at \$675/mo is calculated in the following spreadsheet. The calculations are based upon 30 payment periods because income is deferred one month. The same 10% yield rate is used, which I conclude is a market rate for lease income from the lessee resort owner. The 10% discount rate is higher than the property overall rate. The low mortgage interest rates would allow positive financing leverage. The calculations reflect the 1 month deferred income stream from the March payment. The present value of the lease income stream and the value of the reversion is \$55,952, then rounded to \$56,000. This reversion is then discounted to its present worth to arrive at the present worth of the income stream, and the present worth of the reversion. This process is summarized in the following spreadsheet for Units #2 and #3.

1570

<b>LEASED FEE ANALYSIS - UNIT #2, #3</b>				
Annual Discount Rate			10.0%	
	# Pymnts	Rent	Deferred Factor	Pres. Value
<b>Unit #/Bldg</b>			<b>#2; #3-Bldg A</b>	
<b>Term</b>				
3/3/2015 to 3/31/2015	1	\$ 0	1.000000	\$ 0
4/1/2015 to 8/31/2017	29	\$ 675	25.667435	\$17,326
Present Value of Rents				\$17,326
Reversion		\$56,000	0.779608	\$43,658
Leased Fee Interest				\$60,984

The market value for Units #2 and #3 using the inputs and forecast vacancy, property taxes calculated on the property value, and using current OA fees for these two units is \$60,984, rounded to \$61,000. The value of the contract income stream plus the reversion are the legal and economic components of the property. The real estate tax liability is based upon the levy rate for the capitalized property value.

Units #5, #7a, #7b and #7c require slightly different analysis and treatment of the income and expenses. These four units are not leased, but two were rented and occupied on a month to month basis. The units have rent forecast with landlord paying property taxes, the tenant paying OA fees. Two units are rented month to month. The following spreadsheet reflects this expense distribution and loads the cap rate into the capitalization rate for a loaded cap rate of 10.3887%.

A vacancy allowance of 20% is deducted, and the OA fees are shown as reimbursed expenses in the following analysis. The value of these four units is calculated in the following spreadsheet.

The real property tax treatment for these units is different than the other units because the units leased to Silver Mountain have the tenant paying the taxes. The owner will pay these taxes and that burden is loaded into the capitalization rate.

INCOME CAPITALIZATION APPROACH - OVERALL RATE						
SM Commercial - Units #5, #7a, #7b, #7c						
GROSS INCOME ESTIMATE:					Income	%age of Eff Gross
Type	Size		Rate/SF			
Unit #5	587	x	\$10.00	/ Yr =	\$5,870	
Unit #7a	1,393	x	\$11.00	/ Yr =	\$15,323	
Unit #7b	1,112	x	\$10.00	/ Yr =	\$11,120	
Unit #7c	1,393	x	\$10.00	/ Yr =	\$13,930	
Potential Gross Rents					\$46,243	91.85%
Reimbursed HOA Fees					\$16,692	
Reimbursed Taxes- in Cap Rate					\$0	
Total Potential Gross Income					\$62,935	125.00%
Vacancy & Credit Loss @ 20%					(\$12,587)	27.22%
EFFECTIVE GROSS INCOME					\$50,348	100.00%
EXPENSES:						
Fixed Expenses -						
Property Tax- Load Cap Rate			\$0		\$0	0.00%
Insurance -			\$942		(\$942)	-1.87%
Operating Expenses -						
Utilities - Landlord Expenses			\$0.00			0.00%
Management			10.00%		(\$5,035)	-10.00%
Maint. & Repairs			\$0			
HOA Fees			\$16,692			
Supplies			\$0		(\$16,692)	-33.15%
Reserves for Replacements -						
Building Components-			\$673.00		(\$673)	-1.34%
Total Expenses					(\$23,342)	-46.36%
NET OPERATING INCOME					\$27,006	53.64%
At 10.3887% Overall Rate -					10.3887%	
ESTIMATED VALUE -					\$259,957	

The indicated capitalized value of the four unleased units described above by the Income Approach is concluded to be \$259,957 say \$260,000.

### RECONCILIATION OF VALUE INDICATIONS – INCOME APPROACH

The Income Approach indicates the following value for the subject units:

Units #1, #4, #6	\$585,500
Units #2, #3	\$ 61,000
Units #5, #7a, #7b, #7c	\$260,000
Value by the Income Approach	\$906,500

1572

The income approach analysis is the best and virtually the only approach able to treat the value implications from the lease and property tax issues. The cost to appeal the taxes is an adjustment applied in the final value estimate. There is also a -\$500 adjustment for deferred maintenance for ceiling tile and repairs in Unit #7c. After adjusting for those factors [-\$5,500] the indicated fair market value by the income approach is \$901,000.

### **SALES COMPARISON APPROACH**

The original report contains a sales summary despite the differences between the sales and the subject property. There are simply no similar sales for direct comparison to the subject units. While improved sales of fee owned commercial property have some similarities, the subject is unique in location, has very high quality construction for some units like Unit #1, and all units have complexities due to the lease structures, taxes, and costs. In this update, I place no weight on, and do not rely upon a sales comparison analysis. The changes in lease expenses, the magnitude of the property tax problem, the varying duration of leases, and the complexities of partially reimbursed expenses, as well as varying vacancy rates because of different locational attributes within the project present problems of comparison in the Sales Comparison Approach. The sales in fee or leased fee differ from the condo ownership rights of the subject parcels. For all these reasons, I place reliance on the original Sales Comparison Approach.

### **RECONCILIATION OF VALUE CONCLUSIONS**

The subject property consists of condo units that are part of a structure. Part of a building cannot be replicated, so the Cost Approach is not applicable to the appraisal assignment.

Although the Sales Comparison Approach was researched and originally employed, the sales are predominately fee or leased fee ownerships with different lease and expense structures. The sales have different locational attributes, are physically dissimilar in most cases, and the sales don't reflect similar physical or lease attributes to the subject. None of the comps have the tax issues. The subject units are good quality although they vary in finish, but they are so dissimilar in lease costs and tax assessment impacts that direct sales comparison does not provide the analysis allowed in the Income Approach. No weight is accorded the Sales Comparison Approach. All weight is accorded this revised income approach analysis.

The Income Capitalization Approach allows one to better adjust for the complexities of this appraisal problem with part of the space leased, part vacant, and high tax expenses. It is accorded all the weight in my final value conclusion.

There was an offer to purchase the subject property in November 2014 for \$1,500,000. The offer was contingent upon the purchase of the resort, which has not occurred. The buyer indicates it is a serious offer, and he has tried to purchase the resort for a couple of years. While I have considered that offer, the resort purchase contingency makes it somewhat speculative. I did find the buyers perspective that the subject units in Building A were

1573

critically important to the resort operations as being informative from a buyer's perspective. While considered and analyzed, the offer is accorded little or no weight because it is not likely as of the date of valuation to close, and it has not closed. This offer and the possible sales of the resort may provide an investor some upside potential, and it indicates interest in both the resort and the subject units.

Based upon the above analysis as presented in this updated analysis, in my opinion the Fair Market Value of the subject property as of the date of valuation, was \$901,000. This conclusion considers both actual leases and the tax issue. The spaces not leased are projected at market rents. Prudent ownership and property management should appeal the taxes to resolve the excessive tax assessment. An adjustment for the cost to appeal the taxes of -\$5,000 and an adjustment of -\$500 for deferred maintenance was made in the Income Approach conclusions. The value conclusion reflects an 'as is' condition as of the date of value.

All information in my prior appraisal is used and being extended and incorporated into this report by use of incorporation and an extraordinary assumption. An extraordinary assumption or hypothetical condition may affect the assignment results. The lack of complete leases with payment histories precludes adjusting any lease income streams, and the income analysis uses existing lease income streams.

  
Ed Morse, CRE, MAI

Enclosures:  
Review Appraiser's Certification  
Contingent and Limiting Conditions  
Qualifications

1574



## CERTIFICATION OF THE APPRAISER

I certify that, to the best of my knowledge and belief,

1. The statements of fact contained in this report are true and correct.
2. The reported analysis, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analysis, opinions and conclusions.
3. I have no present or prospective interest in the property that is the subject of this report and I have no personal interest or bias with respect to the parties involved.
4. My engagement in this assignment was not contingent upon developing or reporting predetermined results.
5. My compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or occurrence of a subsequent event.
6. This appraisal was not based on a requested minimum valuation, a specific valuation, or the approval of a loan.
7. My analysis, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Uniform Standards of Professional Appraisal Practice.
8. I have made a personal inspection of the property that is the subject of this report. No one provided significant professional assistance to me except as specifically noted in this report. I have consulted with Tom Godbold of my office on lease discounting calculations and iterations for tax liability. I have performed services, as an appraiser and review appraiser or in any other capacity, regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment.
9. The reported analysis, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and the Standards of Professional Practice of the Appraisal Institute and the Counselors of Real Estate.
10. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
11. As of the date of this report, I have completed the requirements of the continuing education program of the Appraisal Institute.



Ed Morse, CRE, MAI  
CGA-23

## **CONTINGENT AND LIMITING CONDITIONS**

The certification of the Appraiser(s) appearing in this appraisal report is subject to the following conditions and to such other specific and limiting conditions as are set forth by the Appraiser in the report.

1. The appraiser assumes no responsibility for matters of a legal nature affecting the property appraised or the title thereto, nor does the appraiser render any opinions as to the title, which is assumed to be marketable. The property is appraised as though under responsible ownership and competent management.
2. Any sketches or photographs appearing in this report are included to assist the reader in visualizing the property, and the appraiser assumes no responsibility for their accuracy or interpretive quality. The appraiser has made no survey of the property.
3. The appraiser is not required to give testimony or appear in court because of completion of this appraisal, with reference to the property in question, unless arrangements have been made previously.
4. The distribution of the total valuation in this report between land and improvements applies only under the existing program of utilization. The separate valuations for land and buildings must not be used in conjunction with any other appraisal, or separately, and are invalid if so used.
5. The liability of Morse and Company and the appraiser(s) signing this report is limited to the original client only, and liability is limited to the appraisal fee actually received by the appraiser(s). Further, the parties and all users of this report agree there is no duty or liability to any second or third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment. No third party can rely upon this appraisal for any purpose whatsoever, unless they are the intended user as specified in the report.
6. When the appraisal report contains a valuation relating to a geographical portion or tract of real estate, the value reported for such geographical portion relates to such portion only and should not be construed as applying with equal validity to other portions of the larger parcel or tract; and the value reported for such geographical portion plus the value of all other geographical portions may or may not equal the value of the entire parcel or tract considered as an entity.
7. When the appraisal report contains a valuation relating to an estate in land that is less than the whole fee simple estate, the value reported for such estate relates to a fractional interest only in the real estate involved and the value of this fractional interest only in the real estate; and the value of this fractional interest plus the value of all other fractional interests may or may not equal the value of the entire fee simple estate considered as a whole.
8. The appraiser assumes that there are no hidden or unapparent conditions of the property, subsoil, or structures, which would render it more or less valuable. The appraiser assumes no

1576

responsibility for such conditions or for engineering, which might be required to discover such factors.

9. Information, estimates and opinions furnished to the appraiser and contained in this report were obtained from sources considered reliable and believed to be true and correct. However, no responsibility is assumed by the appraiser for the accuracy of such items furnished to, the appraiser.
10. Possession of this report, or a copy thereof, does not carry with it the right of publication and the report may not be used by any person or organization except the client, without the prior written consent of the appraiser and then only in its entirety. Any user or third party may not excerpt or quote only portions of the report. The report must be used in its entirety in order to be properly understood.
11. Disclosure of the contents of this report is governed by the Bylaws and Regulations of the Appraisal Institute and other professional appraisal organizations with which the appraiser is affiliated. Neither all nor any part of the contents of this report (especially any conclusions as to value, the identity of the appraisers or the firm which they are connected, or any reference to the Appraisal Institute or any other professional appraisal organization or designation) shall be disseminated to the public through advertising media, public relations media, news media, sales media or any public means of communication, without the prior consent and approval of the appraisers.
12. On all appraisals subject to satisfactory completion, repairs, or alterations, the appraisal report and value conclusions are contingent upon completion of the improvements in a workmanlike manner.
13. Neither the appraiser's employment, nor the compensation for making this appraisal are contingent upon the acquisition or the amount of financing obtainable, based upon the findings of this report.
14. The existence of hazardous substances, including without limitation asbestos, polychlorinated biphenyls, petroleum leakage, radon gas, or agricultural chemicals, which may or may not be present on the property, or other environmental conditions, were not called to the attention of nor did the appraiser become aware of such materials on or in the property unless otherwise stated.

However, the appraiser is not qualified to test such substances or conditions. If the presence of such substances, such as asbestos, urea formaldehyde foam insulation, or other hazardous substances or environmental conditions may affect the value of the property, the value estimated is predicated on the assumption that there is no such condition on or in the property or in such proximity thereto that it would cause a loss in value. No responsibility is assumed for any such conditions, nor for any expertise or engineering knowledge required to discover them.

Further, the appraisal has not considered the effect of any mold, mildew or fungus, if any is present in the structures. The Appraiser is not qualified to detect, test or identify microbiological organisms.

1577

15. Unless otherwise stated in this report, the subject property is appraised without a specific compliance survey having been conducted to determine if the property is or is not in conformance with the requirements of the Americans with Disabilities Act. The presence of architectural and communications barriers that are structural in nature that would restrict access by disabled individuals may adversely affect the property's value, marketability or utility.
16. This appraisal is not intended to be used for or in conjunction with any securities offering. This appraisal is not intended, or authorized to be used for any securities underwriting purpose without the express written consent of the appraiser.
17. Real Estate markets are subject to future changes and market conditions may be influenced by many factors. Changes in vacancy, competition, interest rates, local economic conditions, and employment levels, among others, are likely to affect real estate values. Lending or investment decisions should be based upon a current appraisal. The appraiser should be contacted to verify the facts and value conclusions in this appraisal prior to any lending or investment decision. No loan or investment should be made on an appraisal over 90 days from the effective date without verification with the appraiser that the report assumptions, sales data, market conditions, and value conclusions remain valid.
18. On appraisals for proposed construction or prospective dates of valuation, the appraiser may have to forecast values or market conditions in order to arrive at the value estimate. The appraiser cannot be held liable for changes in the market or unforeseen events that alter market conditions or property values after the date of the report, but prior to the effective date of appraisal or valuation.
19. This report is the intellectual property of Morse and Company and is subject to the right of copyright by the author. It cannot be copied, excerpted, quoted, or otherwise be used without the express written permission of Morse and Company, and its use is limited to the intended use and intended user as specified in this appraisal report. The appraisal report cannot be posted on, or published to the Internet.
20. Any claim for liability of Morse & Company, and/or the appraiser signing this report, is limited to the amount of the fee charged in the assignment, and in no event shall damages include any consequential or punitive damages. The parties agree that any claim for liability or damages for the appraisal services shall be determined exclusively by binding arbitration, governed by the rules of the American Arbitration Association.
21. Use of and reliance upon the appraisal containing these limiting conditions constitutes consent and acceptance of all the limiting conditions. The appraiser and Morse & Company only have a duty to the intended user and for the intended use of the appraisal report. No other party has a right to rely on the appraisal report.

**QUALIFICATIONS**  
**ED MORSE, CRE, MAI**

**EDUCATION:**

Yakima Valley College - 1968-1970; Bachelor of Science Degree - University of Idaho - 1972  
Masters Degree in Business Admin - University of Idaho - 1973  
Juris Doctorate of Law, Cum Laude - Gonzaga University, College of Law - June 1977

**REAL ESTATE APPRAISAL EDUCATION:**

***University of Idaho***

Essentials of Real Estate (#461) 1971; Real Property Appraisal (#462) - 1972

***American Institute of Real Estate Appraisers/Appraisal Institute***

Principles of Income Property Appraising #201) and Basics Principles, Methods & Techniques of Real Estate Appraisal (#1A) - 1974; Urban Properties (#11) - 1976; Eminent Domain & Condemnation Valuation Principles (#IV) - 1978; Investment Analysis (#006) - 1981; Standards of Professional Practice (#2-3) - 1981; Report writing and Valuation Analysis (#2-2) and Capitalization Theory & Techniques Part A & B (#1BA, #1BB) - Challenged 1989; Case Studies in Real Estate Valuation (#2-1) - Challenged 1990; Separating Real & Personal Prop from Intangible Bus Assets (#SE800) - 2002; SSP - A&B Standards of Professional Practice & USPAP - 2002 (15 hr) 2005 (7 hr); Business Practices and Ethics (#11420N) - 2003, 2007, 2013; (#11420N) - 2007; USPAP Update course (7hr) 2007, 2008, 2010, 2012, 2013; Analyzing Distressed Real Estate - 2009 (4 hr); Data Verification Methods (5 hr) 2010; Subdivision Valuation (7 hr) 2011; Site Use and Valuation Analysis (6 hr) 2011; Analyzing Tenant Credit Risk and Commercial Lease Analysis (7 hr) 2011; Supervising Appraisal Trainees (4 hr) 2011; Cool Tools: New Technology for Real Estate Appraisers 2013; Using Your HP 12C Financial Calculator 2013; Fundamentals of Separating Real Property and Intangible Business Assets, 2013; The Discounted Cash Flow Model: Concepts, Issues, Aps - 2015

***Miscellaneous Courses***

American Right of Way Assn (#401)

Evaluation of Conservation Easements (Appraisal Institute and ASFMRA) - 2008

**SEMINARS:**

***FHLMC***

Residential Instruction Seminar

***SREA***

Introduction to Capitalization Seminar, Condemnation & Partial Takings, Underwriting & Regulations 41-B to 41-C

***Appraisal Institute***

Feasibility & Highest and Best Use Seminar, Income Capitalization Seminar, Appraising Properties with Environmental Hazards, AIREA 1991 Symposium - 1991, Litigation Valuation - 1992, Environmental Considerations in Real Property Valuation - 1992, Appraising the Tough Ones - 1993, Understanding Limited Appraisals & Reporting Options (General) - 1994, Real Estate Risk Analysis - 1995, Litigation Valuation - 1995, Business Valuation - Part I - 1996, Business Valuation - Part II - 1996, Zoning, Police Power & Regulatory Takings - 1996, Timberland Valuation - 1997, 30 Specialized Appraisal Issues - 1998, Appraisal of Detrimental Conditions - 2000, 2000 Real Estate Market Forum - 2000, Valuation of Detrimental Conditions in Real Estate - 2000, Appraisal Review - 2001, Real Estate Fraud: The Appraiser's Responsibilities & Liabilities - 2002, Appraisal Consulting - 2003, Scope of Work - 2003, Mathematically Modeling Real Estate Data Seminar - 2004, Feasibility, Market Value, Investment Timing: Option Value - 2005, The Road Less Traveled: Special Purpose Properties - 2005, Site To Do Business - 2006, Attacking and Defending an Appraisal in Litigation - 2007, Federal Land Acquisitions Seminar - 2007; Right of Way, Three Cases with two Approaches Webinar - 2014, Appraising Airports & Airplane Hangars Webinar - 2014

1579

#### *Law Seminars*

The Art & Science of Mediation-Institute of Conflict Mgmt & First District Bar Assn - 1996, Eminent Domain, Law Seminars International - 1998, Eminent Domain & Land Valuation Litigation, American Law Institute - 1999, Partial Interests: Theory and Case Law - 2000, Eminent Domain & Inverse Condemnation in Idaho, Law Seminars International - 2001, Eminent Domain & Inverse Condemnation, Law Seminars International - 2003

#### *Miscellaneous Seminars & Symposiums*

Loss Prevention - 1998, Skills of Expert Testimony, IRWA - 2000, Recent Development in Federal Tax Valuation - 2000, Appraisal Foundation - Valuation Fraud Symposium - 2006  
Real Estate Market Forum 2007, 2009, 2010, 2012, 2015

#### **PROFESSIONAL AFFILIATIONS/MEMBERSHIPS**

The Counselors of Real Estate (CRE)

Appraisal Qualifications Board of the Appraisal Foundation - past member, past Chairman

Idaho Real Estate Appraiser Board - former Board Member, past Board Chairman

Member, Inland Northwest Chapter of the Appraisal Institute, MAI Certificate #10898

Idaho State Certified General Appraiser, Certificate #23

Washington State Certified General Real Estate Appraiser - #1100698

Licensed Idaho Real Estate Broker - inactive status

Member of the Idaho Bar Association - inactive status

#### **APPRAISAL EXPERIENCE:**

Gridley & Hoagland, Real Estate Appraisers - January 1974 to June 1976; Morse & Morbeck, Real Estate Appraisers - July 1976 to August 1979; Acuff & Morse, Real Estate Appraisers and Counselors - September 1979 to June 1985; Appraiser - Morse & Company, Real Estate Appraisers and Counselors - July 1985 to Present

Authored - "The Appraisal of Community Property," The Appraisal Journal, 10/88, pg 477

#### **TEACHING EXPERIENCE:**

Instructor - Formerly a Certified Instructor for the Idaho Real Estate Commission, Education Council, for their Real Estate Appraisal Course, at various locations and at North Idaho College. Developed and taught a seminar for appraisers on Regulatory Taking Damage Measures for the Inland Northwest Chapter of the Appraisal Institute; and regulatory taking and special benefits seminars for attorneys with Law Seminars International.

Speaking engagements on appraisal issues, qualifications, and eminent domain.

Adjunct University of Idaho College of Law - Appraisal, Valuation & Damages

#### **TYPICAL ASSIGNMENTS:**

Appraisals to determine the Market Value of unimproved land, existing and proposed residential and multi-residential properties; existing and proposed recreational properties and recreational land; agricultural property, timber lands, ranches, special purpose properties; existing and proposed commercial, industrial and mining properties. I have also completed appraisals of existing and proposed subdivisions; PUD's; and condominiums. I have appraised special purpose properties including golf courses, athletic clubs, bowling alleys, psychiatric hospital, mini-lubes, car washes, C-stores, water rights, mining and mineral interests including gravel, corridors, railroad rights-of-way, linear easements, and businesses. I have also appraised conservation easements, numerous partial takings, and remnant parcels, leaseholds, and physical and legal interests. Recreational property includes waterfront lands, condominiums, ski condominiums, waterfront PUD's and condos; and recreational "in holdings" surrounded by public lands and river front recreation land.

I have qualified as an expert witness and testified in both district and magistrate courts in Idaho, Washington, and U.S. Bankruptcy Court. I have testified about actual market value, and as an expert regarding damages on the fee simple estate and partial interests. I have completed appraisals for partial interest acquisitions, for easements and similar fractional interests, in a "before" and "after" situation, and other fractional interests like leased fee subject to a leasehold interest, and life estates. I have testified on damages in condemnation cases and numerous real estate damage cases. I have also completed appraisals on contaminated or impaired properties, and have testified as an expert regarding the value of contaminated property, and damages to real property, and damages to business interests. Litigation and appraisal experience includes easements, fee interests, partial interests and assignments for community property valuation and apportionment of community improvements.

Typical assignments also include appraisals, consulting, counseling to solve real estate problems, feasibility analysis and/or highest and best use analysis; and appraisals on real property interests. I have served as a court appointed arbitrator involving the partition of a large farm with timberlands, and as arbitrator in several cases involving real property and contractual interests. Real estate counseling assignments include the determination of damages, regulatory takings, and the denial of all viable economic use.

**TYPICAL CLIENTS:**

Served as an independent fee appraiser for such clients as:

Ada County Highway Dist	Farmer's Insurance Group	Mountain West Bank
Avista Utilities	First American Title	Panhandle State Bank
Bank CDA	Grange Mutual Life Insurance	Safeco Insurance
Bank of America	Idaho Forest Industries	Spokane County Parks Dept
City of Bonners Ferry	Idaho Independent Bank	Transamerica Mortgage Co City of
Coeur d'Alene	Idaho Power	Umpqua Bank
City of Colville, WA	Idaho Public Utility Comm	Union Pacific Rail Road
City of Hayden	Idaho Transportation Dept	US Bank
City of Sandpoint	Key Bank	Washington Trust Bank
Clark Fork/Pend Oreille Cnsvy	Kootenai County	Wells Fargo Bank
Coeur d'Alene Tribe	Kootenai County Library Dist	Various Law Firms & Attorneys
Columbia Bank	Merrill Lynch	

# **EXHIBIT “E”**

to

Affidavit of Roy Cuzner in Support of  
Washington Federal’s Objection and Motion  
to Disallow Attorneys’ Fees and Costs



## **Terry Copple**

---

**From:** Terry Copple  
**Sent:** Wednesday, September 09, 2015 5:10 AM  
**To:** John Magnuson  
**Subject:** Hulsey Stipulation

John,

This e-mail will confirm that Mr. Hulsey is not interested in splitting the difference between our two appraisals in order to avoid a trial.

Terry

---

From: John Magnuson [john@mail136-25.atl41.mandrillapp.com] On Behalf Of John Magnuson  
[john@magnusononline.com]  
Sent: Friday, August 21, 2015 4:40 PM  
To: Terry Copple  
Subject: Hulsey Stipulation

Terry-

Here is your signed scheduling order stipulation.

John Magnuson

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN 11 PM 3:53

PEGGY WHITE  
CLERK DIST. COURT  
BY *[Signature]*  
DEPUTY

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by	)	
merger to South Valley Bank & Trust,	)	Case No. CV 2014 55
	)	
Plaintiff,	)	
	)	WASHINGTON FEDERAL'S MOTION
vs.	)	FOR REFERRAL TO THE HONORABLE
	)	FRED M. GIBLER
MICHAEL R. HULSEY, individually; SM	)	
COMMERCIAL PROPERTIES, LLC, an	)	
Idaho limited liability company; SILVER	)	
MOUNTAIN CORPORATION, an Oregon	)	
corporation; MORNING STAR LODGE	)	
OWNERS ASSOCIATION, an Idaho non-	)	
profit association; JOHN and JANE DOES I-	)	
X; WHITE CORPORATIONS I-X,	)	
	)	
Defendants.	)	

\*\*\*

COMES NOW Plaintiff Washington Federal by and through its attorney of record, Terry  
C. Copple of the firm Davison, Copple, Copple & Copple, LLP, of Boise, Idaho, and hereby

WASHINGTON FEDERAL'S MOTION FOR REFERRAL TO THE HONORABLE FRED M. GIBLER - 1

1584

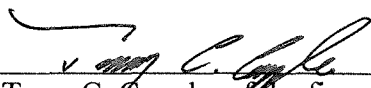
ORIGINAL

moves the above-entitled Court to refer the pending proceedings with regard to attorneys' fees and costs to the Honorable Fred M. Gibler, the original assigned District Court Judge in the above-entitled litigation, on the ground and for the reason that the determination of attorneys' fees and costs in the litigation is required by I.R.C.P. 54(d)(1) to involve the consideration of all of the various contested matters in the entire above-entitled litigation. Because the Honorable Fred M. Gibler adjudicated the vast majority of issues in the above-entitled litigation, it is appropriate that he determine any and all pending attorneys' fees and costs motions of the parties.

This motion is made and based upon the records and files herein and the Affidavit Of Terry C. Copple filed concurrently herewith. Oral argument is requested on this Motion.

DATED this 8 day of January, 2016.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

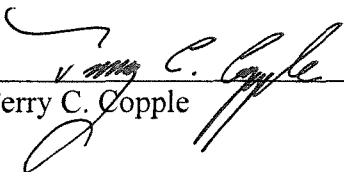
By:   
Terry C. Copple, of the firm  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of January, 2016, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulsey  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
\_\_\_\_\_  
Terry C. Copple

STATE OF IDAHO  
COUNTY OF SHOSHONE/SS  
FILED

2016 JAN 11 PM 3:53

TERRY C. COPPLE (ISB No. 1925)  
MICHAEL E. BAND (ISB No. 8480)  
DAVISON, COPPLE, COPPLE & COPPLE, LLP  
Attorneys at Law  
Chase Capitol Plaza  
199 North Capitol Blvd., Ste. 600  
Post Office Box 1583  
Boise, Idaho 83701  
Telephone: (208) 342-3658  
Facsimile: (208) 386-9428  
[tc@davisoncopples.com](mailto:tc@davisoncopples.com)  
[band@davisoncopples.com](mailto:band@davisoncopples.com)

PEGGY WHITE  
CLERK DIST. COURT  
BY Dara Jones  
DEPUTY

Attorneys for Plaintiff  
Washington Federal

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

WASHINGTON FEDERAL, successor by )	
merger to South Valley Bank & Trust, )	Case No. CV 2014 55
Plaintiff, )	
vs. )	AFFIDAVIT OF TERRY C. COPPLE IN
MICHAEL R. HULSEY, individually; SM )	SUPPORT OF WASHINGTON
COMMERCIAL PROPERTIES, LLC, an )	FEDERAL'S MOTION FOR REFERRAL
Idaho limited liability company; SILVER )	TO THE HONORABLE FRANK M.
MOUNTAIN CORPORATION, an Oregon )	GIBLER
corporation; MORNING STAR LODGE )	
OWNERS ASSOCIATION, an Idaho )	
non-profit association; JOHN and JANE )	
DOES I-X; WHITE CORPORATIONS I-X, )	
Defendants. )	
_____ )	

\*\*\*

STATE OF IDAHO )  
County of Ada ) ss.  
County of Ada )

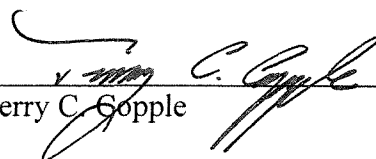
TERRY C. COPPLE, being first duly sworn on oath, deposes and says that:

I am one of the attorneys of record for Plaintiff Washington Federal in the above matter and make this Affidavit based upon my own personal knowledge and belief.

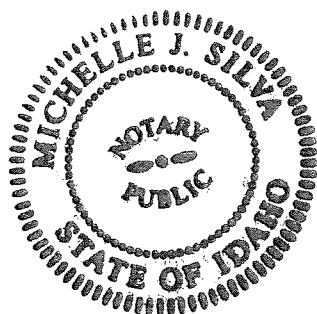
With regard to the determination of the issue of who is a prevailing party in litigation, Rule 54(d)(1) of the Idaho Rules of Civil Procedure requires that the Court evaluate the entire course of the litigation in determining who is a prevailing party. The above-entitled litigation was a highly contested foreclosure lawsuit that extended over many months. The vast majority of the contested issues determined in the litigation were decided by the Honorable Fred M. Gibler except for the final issue of the fair market value of the real estate involved in this litigation.

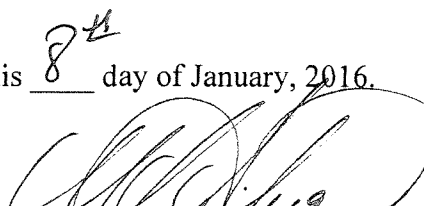
As a result, it is impossible for the issue of the determination of the overall prevailing party in the litigation to be determined unless the District Court Judge that heard the issues in the case evaluates this issue.

DATED this 8 day of January, 2016.

  
Terry C. Copple

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of January, 2016.



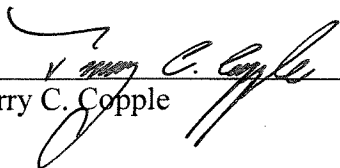
  
Notary Public for Idaho  
Residing at: Meridian, Idaho  
My commission expires: 11/17/2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of January, 2016, a true and correct copy of the foregoing was served upon the following by the method indicated below:

John F. Magnuson, Esq.  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
*Counsel for Defendants Michael R. Hulseley  
and SM Commercial Properties, LLC*

- ☐ First Class, U.S. MAIL
- ☐ Hand Delivery
- ☒ Facsimile (208) 667-0500
- ☐ Electronic Mail: john@magnusononline.com

  
\_\_\_\_\_  
Terry C. Copple